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SUPREME COURT OF THE UNITED STATES.

No. 259.

JAMES H. McLEAN, APPELLANT,

vs.

COCHRAN FLEMING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 19, 1875.

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1 In the circuit court of the United States for the eastern district of Missouri. In equity.

Be it remembered that heretofore, to wit, on the first day of June, A. D. 1872, the following appears of record, to wit:

COCHRANE FLEMING, PLAINTIFF, *vs.* JAMES H. MCLEAN, DEFENDANT. } In chancery.

This day comes the plaintiff, by his solicitor, and files his bill of complaint against the defendant herein, and, on motion of said solicitor, it is ordered that a subpœna in chancery be issued against said defendant, returnable to rules the first Monday in July next.

The said bill of complaint so filed as aforesaid being in words and figures following, to wit:

Bill of complaint.

UNITED STATES OF AMERICA:

In the circuit court of the United States within and for the districts of Missouri. In equity.

COCHRANE FLEMING, COMPLANANT, *vs.* JAMES H. MCLEAN, DEFENDANT.

To the judges of the circuit court of the United States within and for the districts of Missouri:

2 Cochrane Fleming, of Pittsburgh, in the State of Pennsylvania, a citizen of said State, brings this his bill against James H. McLean of S't Louis, in the eastern district of Missouri, and a citizen of the State of Missouri, and thereupon your orator complains and says that he is now, and for the last sixteen months has been, extensively engaged, individually, in the manufacture and sale of a certain pill, designated and known in trade, and by public advertisement, and by dealers and consumers as "D'r C. McLane's Liver Pills," and that said pills have become very extensively known and used in the United States and in other countries.

Your orator states *states* further that said pills were first made and sold by D'r Charles McLane at Morgantown, Virginia, where said McLane resided, that said McLane was the original and exclusive inventor and proprietor of said pills, and first made and sold the same by the name and description of "D'r McLane's Liver Pills," and by that name they were known and designated, and were made and sold only by said D'r Charles McLane, till June 19th, 1844, when said McLane, by bill of sale of that date sold his interest therein to one Jonathan Kidd, of Pittsburgh, Pennsylvania, giving said Kidd the right to make and vend the same in the United States, reserving only the privi-
3 lege of making and vending the same himself in Morgantown aforesaid, as will appear by said bill of sale, a copy of which is herewith filed, marked "A," and thereby said Jonathan Kidd became the sole owner and proprietor thereof, with the exclusive right to make

and sell the same, and to use the name thereof, excepting only the personal privilege reserved as aforesaid.

And thereupon the said Kidd began at Pittsburgh, Pennsylvania, the manufacture and sale of said pills according to the recipe of said D'r McLane, and continued such manufacture and sale at said place till about the 11th day of April, A. D. 1845, when said Kidd formed a partnership with one John Fleming, under the name and style of Jon'n Kidd & Co., and said Kidd invested said firm with the full right to make and sell said pills, and to use the name thereof; and said firm engaged largely in the business of making and selling said pills, and in order to designate the same as an article of their own manufacture, and to prevent imposition and fraud upon the public and persons desirous to purchase the same, said firm, during or before the year 1847, commenced putting up said pills in wooden boxes of uniform size, shape, and appearance, having perpendicular sides, with top and bottom of elliptical shape, each box containing twenty-two pills, and caused the words "McLane's Liver Pill" to be stamped in red wax upon the cover of each box.

4 And in further pursuance of their said design to designate said pills as the genuine article so manufactured by them as aforesaid, said firm procured, at their own expense, certain plates, and caused to be made therefrom a certain token, label, or trade-mark, consisting of a wrapper, which was placed by them around each box of pills, and which was printed with ink of a light-red color; the portion thereof covering the top of each box being engraved with a narrow border of scolloped pattern, surrounding a panel with background of wave-line engraving, and with the words "D'r McLane's celebrated Liver Pills. In sick headache and in all bilious complaints surpassed by none. Price 25 c'ts," engraved thereon and appearing in white letters shaded by red lines; and on the portion of said wrapper covering the rear side of the box, a panel of similar background surrounded by a border of dark and light-red and white lines appearing interlaced or interwoven, and with the words following, to wit: "In future, my genuine liver pills will have a red steel engraved wrapper, and my name in red wax on each box," appearing thereon in white letters shaded by red lines, and having also a fac-simile of the signature of C. McLane engraved and printed in red ink at the bottom thereof; and upon that portion of the said wrapper covering the front side of the box a panel with border and background similar to that last mentioned, having the words "Prepared

5 for the proprietor by J. Kidd & Co., No. 60 Wood st., Pittsburg, P'a" thereon in white letters shaded with red lines, and also the words "None can be genuine without the signature of Jon'n Kidd & Co." printed thereon in red ink, the words, "Jon'n Kidd & Co." being a fac-simile of said firm's signature. A copy of said label is hereto annexed marked "B," and made part hereof, one of which labels or trade-marks was placed on and around each box of said pills made and sold by said firm.

The said firm being thus the sole and exclusive owners of said pills, and of the recipe for making the same, and of the said token, label, or trade-mark, and the plates for the same, exclusively made, put up, and sold said pills, and said label or trade-mark thereon, and brought the same into notice, and by the expenditure of large sums of money in advertising, and by exercise of energy and skill, they gave to said pills a wide and enviable reputation, and they derived from the manufacture and sale thereof large profits.

Your orator states further that on the 29th day of March, 1853, said Jonathan Kidd died, leaving the said John Fleming the sole surviving

partner of said firm of Jon'n Kidd & Co., who continued the business of said firm, and on or about the 30th day of April, 1853, the executors of said Jonathan Kidd, for the sum of thirty-four thousand dol-
6 lars and other considerations, conveyed to said surviving partner, John Fleming, and to your orator jointly, who formed a partnership under the name and style of Fleming Brothers, all the right, title, interest, and claim of said Jon'n Kidd in and to the goods, chattels, bonds, notes, accounts, claims, rights, and credits of every description belonging to the late firm of Jon'n Kidd & Co., in the drug business, in Pittsburg aforesaid, as will appear by bill of sale thereof, dated April 30th, 1853, a copy of which is hereto annexed and marked "C."

Under said bill of sale said John Fleming and Cochrane Fleming, composing the firm of Fleming Brothers, at once took possession of the business of making and selling said D'r C. McLane's Liver Pills; and of said plates, tokens, labels, and trade-marks, and thereby became the exclusive owners of the same, and of the right to make and sell the same, with the said tokens, labels, and trade-marks thereon, except the right reserved to said D'r Charles McLane as aforesaid.

On or about January 11th, 1854, Lemuel Wilcox, j'r, became a partner in said firm of Fleming Brothers, and afterwards said D'r Charles McLane relinquished to said Fleming Brothers all his right thereto, and further recognized and confirmed to said Fleming Brothers the full and exclusive right in said pills and said labels and trade-
7 marks, by contract dated January 8th, 1857, a copy of which is herewith filed, marked "D."

Said firm of Fleming Brothers greatly enlarged the business of making and selling said pills until the year 1855, since which time, until the year 1872, while putting them up in boxes of the same material, size, and shape as already hereinbefore described, and placing a seal with the words "McLane's Liver Pill" stamped in red wax upon the cover of each box containing said pills, as before described, they folded around each box a circular containing remarks upon the nature and effect of said pills, and the diseases for which they are recommended, with directions for their use, printed in the English, German, French, and Spanish languages, a copy of which circular is hereto attached and marked "E."

And in order still further and more readily to distinguish said article of pills so manufactured by them as aforesaid as of their own manufacture, they procured new steel plates, and caused to be printed therefrom labels or trade-marks forming an external wrapper, consisting of a fine steel-engraving, with a fac simile of the signatures of C. McLane and said firm of Fleming Bros. engraved thereon; the ground-work of said engraved wrapper on the top of the box being composed of fine lines crossing the box diagonally and at right angles with each other, and the words "D'r McLane's Celebrated Liver Pills. In sick
8 headache and in all bilious complaints surpassed by none. Price, 25 cents," engraved thereon, showing the letters and figures in white; the words "celebrated liver pills" being upon a scroll similar to a double ogee in form, with black back-ground.

On said engraved wrapper, covering one side of said boxes, said firm caused to be engraved and printed the words "Prepared only by Fleming Bros., successors to Jon. Kidd & Co.," all in white letters; also a fac simile of their signature in black, and the words "without whose signature none can be genuine," printed in black letters; and on the opposite side of said boxes are printed other words in white letters, as follows: "In future, my genuine liver pills will have a fine steel-en-

graved wrapper, and my name in red wax on each box," with a fac simile of C. McLane in black script, a copy of which label is hereto attached, marked "F."

The business of making and selling said pills with said labels, tokens, and trade-marks thereon was carried on by said firm of Fleming Brothers from the said 30th day of April, 1853, in their said firm-name, and said firm from said last-mentioned date owned and held among their firm-assets the right of making and selling said pills, and using thereon said tokens, labels, and trade-marks, notwithstanding the changes that were made from time to time from said 30th day of April, 1853,
9 until the present time, in the individual members of said firm, which were as follows:

On the 11th day of January, A. D. 1854, Lemuel Wilcox, j'r, became a member of said firm, which was composed of said John Fleming, Cochrane Fleming, and said Wilcox, until the 12th day of October, 1857, when said Lemuel Wilcox, j'r, withdrew from said firm, and in consideration of the sum of seventeen thousand dollars, conveyed to said John Fleming all his right, title, interest, and claim of, in, and to the property, assets, and effects whatever of said firm of Fleming Brothers, including the right to make and sell said pills, and to use said tokens, labels, and trade marks, as will appear by said Wilcox' bill of sale of that date, a copy of which is hereto attached, marked "F²," and from and after said 12th day of October, 1857, said firm, composed of said John Fleming and Cochrane Fleming, carried on the business of making and selling said pills, put up as aforesaid, with said labels thereon, until the 1st day of July, A. D. 1865, when said Cochrane Fleming withdrew from said firm, and in consideration of the sum of thirty-five thousand dollars relinquished to said John Fleming all his (said Cochrane's) interest, right, title, or claim in and to all the property and assets of said firm of Fleming Brothers, and said John
10 Fleming thereafter, under said firm-name of Fleming Brothers, continued to carry on the business of making and selling and puting up said pills as above described, at Pittsburgh, P'a, till about the 2d day of November, 1870, when the said John Fleming died, and by will, a copy of which is herewith filed, marked "G," and made a part hereof, bequeathed to your orator the good will and proprietorship of McLane's and other medicines owned and controlled by him, which included said liver pills, and the right to make, put up, and sell the same, as described last aforesaid, upon certain conditions, in effect that your orator should take charge of and carry on said business and pay off the pecuniary legacies given in his said will, all of which your orator has done.

And by his said will said John Fleming bequeathed to your orator, after payment of the legacies of said will, all the residue of his estate, and thereby your orator became, and now is, the sole and exclusive owner and proprietor of said pills, and the recipe for making the same, and of said tokens, labels, and trade-marks, and the plates therefor, and has the sole and exclusive right to make and sell said pills, and to use said tokens, labels, and trade-marks, and as residuary legatee of said John Fleming your orator is entitled to recover all damages
11 or profits that accrued to him in his life-time, or to said of Fleming Brothers.

And your orator has, since the death of said John Fleming, continued, and still continues, the business of making and selling said pills, and using thereon the said label and trade-mark, under the said name of Fleming Brothers as hereinbefore described, and your orator is now

using said label as shown by Exhibit F, with these exceptions only, that within the last few months he has used and now uses as a ground-work on his labels, shaded curved lines cutting and crossing each other in such a way as to produce the effect of alternate light and shade, crossing the top of the box diagonally, in place of straight lines crossing each other diagonally as hereinabove described, and he now omits on his labels as now used by him, the words, "successor to Jon. Kidd & Co.," and has also substituted "24" in place of "60" as the number of Wood street, as will appear in Exhibit H, hereto annexed; and that both said firm of Fleming Brothers, until the death of John Fleming, and from that time, your orator, doing business in said firm-name as aforesaid, have, since the passage of the act of Congress requiring the same, placed across the bottom and ends of each box of said pills
12 when put up for sale, and over the folds of the external wrapper, their proprietary United States revenue stamp.

And your orator says that being the sole and exclusive owner and proprietor of said pills, and the receipt for making the same, and of said tokens, labels, and trade-marks, and the plates therefor as aforesaid, and having the sole and exclusive right to make and sell said pills, prepared and put up as aforesaid with said tokens, labels and trade-marks thereon, your orator hoped he might be permitted to exclusively manufacture and sell the same so put up, and to exclusively use, for the purpose of indicating the origin of said pills, said tokens, labels, and trade marks; but the defendant, with the intent to injure and defraud your orator in the premises, and to reap the advantages, benefits, and profits of the credit and reputation of said pills, is now engaged, and has been engaged for some time, to wit, a period unknown to your orator, but believed by him to be several years, making and vending, and causing to be vended by others, a spurious, counterfeit, and inferior article of pills, prepared in imitation of and calculated and intended to be sold as the genuine "D'r C. McLane's Liver Pills," of your orator's own manufacture, and having thereon a false, forged, and counterfeit token, label, or trade-mark, made in imitation of and closely re-
13 sembling that of your orator, so as to enable the defendant to reap the benefits and profits of the credit and reputation of the genuine pills made and sold by your orator as aforesaid, which reputation was acquired for said pills by your orator and his predecessors in ownership as aforesaid, at great expense, and when thus prepared, the defendant has sold, and is now selling, and causing to be sold, said spurious and counterfeit pills as the genuine article of your orator's own manufacture, intending to deceive and thereby actually deceiving the public and customers of your orator, and supplanting your orator's trade and injuring him to a large amount, but which your orator is unable to state or fix without a statement or account of the amount of sales made as aforesaid by said defendant.

And the defendant, for the purpose of more completely and effectually deceiving the public and persons wishing to buy the genuine pills of your orator's own manufacture, puts up his said false, counterfeit, and spurious pills in boxes of the same material, size, and shape of those used by your orator as aforesaid, and places upon the cover of each box a seal in red wax of the same style, size, and appearance as the red seal used by your orator as aforesaid, and which is specially
14 used and referred to by your orator in his printed circulars and advertisements, and relied upon by him to indicate to the public and his customers the genuine article of pills made and sold by your orator as aforesaid: and, while endeavoring completely to deceive the

public and those seeking the genuine pills of your orator, by the use of the red seal so placed upon the cover of the boxes used by the defendant as aforesaid, he seeks to shield himself from the inevitable consequence of his attempt to injure and defraud your orator by using a stamp impressing, in faint and obscure letters, on said red wax the words "J. H. McLean, St Louis," which are yet so illegible as not to undeceive those who are cheated into supposing, from the mere presence of the seal on the cover of the box, that the same contains the genuine pills manufactured by your orator; and the defendant places around the boxes of pills so put up by him a circular, printed in the English, German French, Spanish, and other languages, a copy of which is attached hereto, marked "J," and encloses the whole with a wrapper consisting of a lithograph impression similar in genuine appearance to the outer wrapper used by your orator, the body thereof being formed like that of your orator, of lines crossing the box diagonally and at right angles to each other, with the words "D'r J.
15 H. McLean's Universal Pills, or Vegetable Liver Pills, prepared only by D'r J. H. McLean, No. 314 Chestnut street, St Louis, Mo.," printed thereon across the top of each box in white letters; the words "Universal Pills" being upon a background of black, and on a strip or scroll circular in form; the whole presenting a general appearance similar to the label covering the top of the box used by your orator as aforesaid, while upon the label covering the side of said boxes put up by defendant are printed the words "To prevent counterfeiting I have changed the colour of my label," in white letters upon a dark background, such as is used by your orator, and with the defendant's name, "D'r J. H. McLean," signed in black script, but in such obscured lettering as to be almost illegible; and on the label covering the other side of said box the defendant causes to be printed in white letters, in style and appearance resembling the label used by your orator, the words, "For the cure of liver complaint, headache, bilious diseases, &c." A copy of said counterfeit label is hereto attached, marked "K."

And your orator avers that the defendant caused to be printed and uses said label as aforesaid, as your orator believes and charges
16 the fact to be, for the sole purpose of enabling him to defraud your orator of trade and profit by selling his spurious and counterfeit goods, as, and for the goods so advertised, manufactured, and sold by your orator.

And your orator further says that the illegal and wrongful acts set forth and complained of aforesaid are but the carrying out of fraudulent designs of the defendant, which he long ago conceived, with the purpose of drawing your orator's trade to himself by the wrongful use of fraudulent imitations of said tokens, labels, and trade-marks of your orator; and in furtherance of that purpose, as your orator believes and charges the fact to be, the defendant did, prior to the year 1855, print, or cause to be printed, a certain false or counterfeit token, label, or trade mark, in imitation of or closely resembling the token, label, and trade-mark then and for many years theretofore exclusively used and owned by Jon'n Kidd & Co. aforesaid, being the label of a light-red color hereinbefore fully described and referred to as Exhibit B, and defendant placed said false and counterfeit labels on boxes of pills of his own manufacture, which boxes were similar to the boxes then used by said Jon Kidd & Co., and on the lid of each box of pills so put up and
17 sold by him he placed a seal stamped in red wax in imitation of that used by said Kidd & Co. as aforesaid, and then wrapped each box of pills in one of the counterfeit labels last above described,

which label consisted of an engraved wrapper printed with ink of a light-red color, nearly resembling in shade and general appearance that used by said Kidd & Co., and with the words "Dr. McLean's Universal Pills for the cure of liver complaint, headache, bilious diseases, &c.," printed on the portion covering the top of each box, in white letters shaded by red lines, and below the above the words, "Price (see directions inside) 25 c'ts."

On the side of the box were printed on the wrapper the words "D'r McLean's Universal Pillen zur heilung von leber krankheiten kopweh biliösen krankheiten U. S. W.," appearing in white letters, shaded by red lines, as in the genuine label, and with the words "Vorschrift auf der innem seite," printed in red letters underneath, while on the portion of said wrapper covering the opposite side of said box are printed the words, "Prepared by J. H. McLean, N. E. corner 3d and Pine st's, S't Louis, Mo." A copy of said label is hereunto attached, marked "L."

And your orator believes and charges that the defendant procured and used the said last-described label solely for the purpose of
18 deceiving the public, and those wishing to buy the genuine pills made and sold as aforesaid by said Jon. Kidd & Co.; but he says that defendant's fraudulent designs were to some extent frustrated, and the effects of his wrongful acts partially averted from the rightful proprietor of said label and trade-mark, by the circumstance of the said Fleming Brothers, in the year 1855, having changed the label and wrapper used by them and by said Jon. Kidd & Co. prior to that time, and adopted the label lately used by your orator as aforesaid; but your orator says that after the adoption by him of said last-named label as aforesaid, the defendant continued for many years to use the red label procured and used by him in imitation of the trade-mark used by said firm of Fleming Brothers as aforesaid, but finding the carrying on of his said business unprofitable while he was using his said fraudulent red label and your orator was using the dark label above described, defendant conceived the design of changing the color of his label and adopting, in place of the red label theretofore used by him, another dark label, in imitation of the label or trade-mark of your orator, which was done, as your orator believes and charges, for the purpose of wrongfully diverting the trade of your orator to himself, and enabling him to
19 sell his goods as and for the goods manufactured and sold by your orator, and not for the purpose of preventing counterfeiting, as defendant falsely publishes on his own fraudulent label.

Your orator states further that said defendant was never authorized by him to make, put up, or sell said pills as of your orator's own manufacture, or to use or make said tokens, labels, or trade-marks in imitation of or resemblance to those of your orator, as said defendant is charged to have done above, nor to make or sell any such false or counterfeit pills with such false or counterfeit labels attached thereto, but said defendant well knows that your orator is now, and his predecessors were, the sole and exclusive proprietors of said D'r C. McLane's celebrated Liver Pills, and of the said labels and trade-marks, marked "B" & "F," as hereinbefore set forth. And said defendant also well knows that said false and counterfeit labels or trade-marks used by him are mere imitations of the labels and trade-marks of your orator and his predecessors, made, contrived, got up by said defendant with the intent to deceive the public and purchasers, and to defraud your orator.

All of which acts and things and pretenses are against equity and good conscience, and a great loss and damage to your orator, and inasmuch as your orator is without full redress at law, and can only ob-

public and those seeking the genuine pills of your orator, by the use of the red seal so placed upon the cover of the boxes used by the defendant as aforesaid, he seeks to shield himself from the inevitable consequence of his attempt to injure and defraud your orator by using a stamp impressing, in faint and obscure letters, on said red wax the words "J. H. McLean, St Louis," which are yet so illegible as not to undeceive those who are cheated into supposing, from the mere presence of the seal on the cover of the box, that the same contains the genuine pills manufactured by your orator; and the defendant places around the boxes of pills so put up by him a circular, printed in the English, German French, Spanish, and other languages, a copy of which is attached hereto, marked "J," and encloses the whole with a wrapper consisting of a lithograph impression similar in genuine appearance to the outer wrapper used by your orator, the body thereof being formed like that of your orator, of lines crossing the box diagonally and at right angles to each other, with the words "D'r J.
15 H. McLean's Universal Pills, or Vegetable Liver Pills, prepared only by D'r J. H. McLean, No. 314 Chestnut street, St Louis, Mo.," printed thereon across the top of each box in white letters; the words "Universal Pills" being upon a background of black, and on a strip or scroll circular in form; the whole presenting a general appearance similar to the label covering the top of the box used by your orator as aforesaid, while upon the label covering the side of said boxes put up by defendant are printed the words "To prevent counterfeiting I have changed the colour of my label," in white letters upon a dark background, such as is used by your orator, and with the defendant's name, "D'r J. H. McLean," signed in black script, but in such obscured lettering as to be almost illegible; and on the label covering the other side of said box the defendant causes to be printed in white letters, in style and appearance resembling the label used by your orator, the words, "For the cure of liver complaint, headache, bilious diseases, &c." A copy of said counterfeit label is hereto attached, marked "K."

And your orator avers that the defendant caused to be printed and
16 uses said label as aforesaid, as your orator believes and charges the fact to be, for the sole purpose of enabling him to defraud your orator of trade and profit by selling his spurious and counterfeit goods, as, and for the goods so advertised, manufactured, and sold by your orator.

And your orator further says that the illegal and wrongful acts set forth and complained of aforesaid are but the carrying out of fraudulent designs of the defendant, which he long ago conceived, with the purpose of drawing your orator's trade to himself by the wrongful use of fraudulent imitations of said tokens, labels, and trade-marks of your orator; and in furtherance of that purpose, as your orator believes and charges the fact to be, the defendant did, prior to the year 1855, print, or cause to be printed, a certain false or counterfeit token, label, or trade mark, in imitation of or closely resembling the token, label, and trade-mark then and for many years theretofore exclusively used and owned by Jon'a Kidd & Co. aforesaid, being the label of a light-red color hereinbefore fully described and referred to as Exhibit B, and defendant placed said false and counterfeit labels on boxes of pills of his own manufacture, which boxes were similar to the boxes then used by said
Jon Kidd & Co., and on the lid of each box of pills so put up and
17 sold by him he placed a seal stamped in red wax in imitation of that used by said Kidd & Co. as aforesaid, and then wrapped each box of pills in one of the counterfeit labels last above described,

which label consisted of an engraved wrapper printed with ink of a light-red color, nearly resembling in shade and general appearance that used by said Kidd & Co., and with the words "Dr. McLean's Universal Pills for the cure of liver complaint, headache, bilious diseases, &c.," printed on the portion covering the top of each box, in white letters shaded by red lines, and below the above the words, "Price (see directions inside) 25 c'ts."

On the side of the box were printed on the wrapper the words "D'r McLean's Universal Pillen zur heilung von leber krankheiten kopweh biliösen krankheiten U. S. W.," appearing in white letters, shaded by red lines, as in the genuine label, and with the words "Vorschrift auf der innem seite," printed in red letters underneath, while on the portion of said wrapper covering the opposite side of said box are printed the words, "Prepared by J. H. McLean, N. E. corner 3d and Pine st's, S't Louis, Mo." A copy of said label is hereunto attached, marked "L."

And your orator believes and charges that the defendant procured and used the said last-described label solely for the purpose of
18 deceiving the public, and those wishing to buy the genuine pills made and sold as aforesaid by said Jon. Kidd & Co.; but he says that defendant's fraudulent designs were to some extent frustrated, and the effects of his wrongful acts partially averted from the rightful proprietor of said label and trade-mark, by the circumstance of the said Fleming Brothers, in the year 1855, having changed the label and wrapper used by them and by said Jon. Kidd & Co. prior to that time, and adopted the label lately used by your orator as aforesaid; but your orator says that after the adoption by him of said last-named label as aforesaid, the defendant continued for many years to use the red label procured and used by him in imitation of the trade-mark used by said firm of Fleming Brothers as aforesaid, but finding the carrying on of his said business unprofitable while he was using his said fraudulent red label and your orator was using the dark label above described, defendant conceived the design of changing the color of his label and adopting, in place of the red label theretofore used by him, another dark label, in imitation of the label or trade-mark of your orator, which was done, as your orator believes and charges, for the purpose of wrongfully diverting the trade of your orator to himself, and enabling him to
19 sell his goods as and for the goods manufactured and sold by your orator, and not for the purpose of preventing counterfeiting, as defendant falsely publishes on his own fraudulent label.

Your orator states further that said defendant was never authorized by him to make, put up, or sell said pills as of your orator's own manufacture, or to use or make said tokens, labels, or trade-marks in imitation of or resemblance to those of your orator, as said defendant is charged to have done above, nor to make or sell any such false or counterfeit pills with such false or counterfeit labels attached thereto, but said defendant well knows that your orator is now, and his predecessors were, the sole and exclusive proprietors of said D'r C. McLane's celebrated Liver Pills, and of the said labels and trade-marks, marked "B" & "F," as hereinbefore set forth. And said defendant also well knows that said false and counterfeit labels or trade-marks used by him are mere imitations of the labels and trade-marks of your orator and his predecessors, made, contrived, got up by said defendant with the intent to deceive the public and purchasers, and to defraud your orator.

All of which acts and things and pretenses are against equity and good conscience, and a great loss and damage to your orator, and inasmuch as your orator is without full redress at law, and can only ob-

tain adequate relief in equity, and as he avers that a continu-
20 ance of the acts aforesaid will occasion irreparable loss and injury to him: To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, and perfect answer make to all the allegations hereof, and to the several interrogatories hereinafter numbered and set forth, that is to say—

1. Whether the defendant has not at some time, and, if so, at what time, by himself, his agents, or servants, made and sold pills put up in wooden boxes with an impression stamped in red sealing-wax on the cover of each box, with a circular the same as Exhibit J, placed around each box, and all enclosed in a wrapper or label of which Exhibit L is a copy, and how many such were sold by defendant, and at what price, the period of time during which the same were so sold by him, and at what profit.

2. Whether the defendant has not, within the last five years, or for a longer period, or during some portion of said period, been engaged himself, or by his agents or servants, in making, putting up, and selling an article of pills, which he prepared for market by putting them up in wooden boxes, with an impression stamped in red sealing-wax
21 on the cover of each box, placing around each box of pills so prepared a circular which is a copy of Exhibit J, and enclosing the whole in a wrapper consisting of a label or trade-mark in imitation of or closely resembling the label or trade-mark of your orator, and such as is shown by Exhibit K hereto; at what time he began to use said label, and at what time he changed from said red label L to Exhibit K; also, what number of boxes of pills so put having said label thereon the defendant has sold, at what price, and at what profit.

And that an account may be taken of all the dealings and transactions of the said defendant touching the aforesaid premises; and that he may be ordered and directed to pay to your orator any and all profits received by him from any and all sales made by him of the aforesaid pills, having the aforesaid false and counterfeit labels or trade-marks attached; and also all damages sustained by your orator by the wrongful acts aforesaid: and that the defendant may be restrained by the order and injunction of this honorable court from making, vending, or exposing to sale, either by himself, his agents, or servants, any article of pills with the said false and counterfeit tokens, labels, or trade-marks hereinbefore referred to as Exhibits K & L, appended or attached
22 to the same, or any other token, label, or trade-mark whatever, made in imitation of or resembling the tokens, labels, or trade-marks used and owned by your orator before referred to, and hereinbefore described, and marked Exhibits B & F, and from selling the same as the genuine pills of your orator; and that your orator may have such further and other relief in the premises as the nature and circumstances of the case may require and to your honors may seem meet.

And may it please your honors to grant unto your orator not only your writ of injunction, issuing out of and under the seal of your honorable court, to be directed to said James H. McLean, defendant herein, to restrain him fully as above prayed, but also the honorable court's writ of subpœna, to be directed to the said James H. McLean, thereby commanding him at a certain time, and under a certain penalty, to be therein limited, personally to appear and be before your honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand and perform and abide such

further order, direction, and decree therein as to your honors shall seem meet; and your orator will ever pray, &c.

M. L. GRAY & DENNISON,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

23 Cochrane Fleming, of lawful age, complainant, being duly sworn, on oath says that he has read the foregoing bill and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are therein stated to be on information and belief, and as to those matters he believes them to be true.

COCHRANE FLEMING.

Subscribed & sworn to before me this 14th day of May, A. D. 1872.

S. C. McCANDLESS,
U. S. Commissioner, W. D. Pa.

EXHIBIT A.

MORGANTOWN, V'A, *June 19th*, 1844.

Article of agreement made this day between D'r Cha's McLane, of the one part, and Jon. Kidd, of the other part, witnesseth:

D'r Cha's McLane, of the first part, has sold the receipt for making the medicine called D'r McLane's American Worm Specific; also his interest in the Liver Pill and Lung Syrup, to make and vend in these United States with the privilege of making and vending himself in Morgantown, V'a.

The sum said Jon. Kidd gives the doctor of the first part is three hundred dollars a year for three years, in all nine hundred dollars. The doctor binds himself to sell said right to no other person. J. Kidd
24 binds himself to pay said amount annually, except death should occur and his business be discontinued.

In witness whereof the parties to these presents have hereunto set their hands and seals.

Dated as above.

(Signed) CHARLES McLANE. [SEAL.]
(Signed) JON. KIDD. [SEAL.]

Exhibit B cannot be inserted in the body of this transcript, and the original is certified herewith.

EXHIBIT C.

Know all men by these presents that we, James Benney, Lemuel Wilcox, j'r, & Nancy B. Kidd, executors of the last will & testament of Jonathan Kidd, late of the city of Alleghany, deceased, for the consideration of the sum of thirty-four thousand dollars, the payment of which has been secured to our satisfaction by John Fleming & Cochrane Fleming, of the city of Pittsburg, have granted, bargained, sold, assigned, transferred, and set over to the said John Fleming & Cochrane Fleming, their executors, administrators, & assigns, all the right, title, interest, & claim belonging to the estate of said Jonathan Kidd, deceased, of, in, & to the goods, chattels, bonds, notes, accounts, claims, rights, & credits of every description belonging, or in any manner appertaining, to the late firm or copartnership of J. Kidd & Co. (which was composed
25 of the said Jonathan Kidd & John Fleming), in the drug business in the city of Pittsburg, with full power and authority to said

John & Cochrane Fleming, & those claiming under them, to have & enjoy forever all the right, title, interest, & claim aforesaid, of, in, & to said goods, chattels, bonds, notes, accounts, & claims, rights and credits, they, the said John & Cochrane Fleming, paying & satisfying all the debts, claims, & demands against said late firm or copartnership of J. Kidd & Co.

In testimony whereof we have hereunto set our hands & seals this thirtieth day of April, eighteen hundred & fifty-three.

(Signed) JAMES BENNEY. [SEAL.]
L. WILCOX, J'R. [SEAL.]
NANCY B. KIDD. [SEAL.]

Attest as to James Benney & I. Wilcox, j'r:
A. N. LOOMIS.

EXHIBIT D.

Know all men by these presents, that we, Doct. Charles McLane, Doct. Isaac Scott, Enoch P. Fitch, & George M. Hagens, of Morgantown, Monongalia County, & State of Virginia, are jointly & severally held & firmly bound unto John Fleming, Cochrane Fleming, & Lemuel Wilcox, partners doing business under the firm of Fleming Brothers, of the city of Pittsburg, in the sum of twenty thousand dollars, to be paid to the said Fleming Brothers, their certain attorney, executors, administrators or assigns, to which payment, well & truly to be made,
26 we do bind ourselves, our heirs, executors, administrators, & every of them, jointly & severally, firmly by these presents. Witness our hands & seals the eighth of January, in the year of our Lord one thousand eight hundred and fifty-seven.

The condition of the above obligation is such, that whereas John Fleming, Cochrane Fleming, and Lemuel Wilcox, under the name of Fleming Brothers, have been and are now engaged in the manufacture of certain medicines known as "McLane's Liver Pills," and "McLane's Vermifuge," claimed under and by virtue of such right therein and thereto as had been transferred to & vested in Jonathan Kidd, late deceased, of Pittsburg, by a certain writing made & delivered to the said Jonathan Kidd, in his life-time, by the said Doct. Charles McLane, inventor of the said medicines, & which right therein, so transferred to the said Jonathan Kidd, as aforesaid, has been acquired from the said Jonathan Kidd by the said Fleming Brothers, successors to J. Kidd & Co., of Pittsburg;

And whereas the said Doct. Charles McLane, subsequently by articles of agreement transferred to the said Isaac Scott, George M. Hagans, & Enoch P. Fitch, under the firm-name of I. Scott & Co., all his right, title, and interest in Doct. McLane's American Worm Specific or Vermifuge, Liver Pills, and Lung Syrup;

27 And whereas the said Doct. I. Scott, George M. Hagens, & Enoch P. Fitch, of Morgantown, Virginia, under the name of D'r I. Scott & Co., have been engaged in the manufacture & sale of certain medicines invented by the said D'r I. Scott, & owned by the said I. Scott & Co., & called D'r McLane's Improved Liver Pills, and Vermifuge, and Lung Syrup (none of the Lung Syrup, however, has been manufactured or sold by the said I. Scott & Co.), & Doct. I. Scott's White Circassian Liniment.

And whereas, in consideration of the sum of thirteen thousand dollars, paid by the said Fleming Brothers to the said D'r Isaac Scott,

Enoch P. Fitch, & George M. Hagans, the receipt whereof is hereby acknowledged, and the said D'r Isaac Scott, Enoch P. Fitch, & George M. Hagans, having fully satisfied the said Charles McLane for the license-fee of his right, title, & interest in D'r McLane's American Worm Specific or Vermifuge, Liver Pills, & Lung Syrup, as hereinbefore recited, as the said D'r Charles McLane doth hereby acknowledge, he, the said Doct. Charles McLane, doth confirm, & hath confirmed the *the* right of the said Fleming Brothers to manufacture & sell the said medicines known as Doct. McLane's Liver Pills and Vermifuge, so far as he hath authority to confirm said right, hereby intending to
28 transfer to said Fleming Brothers all the right, title, & interest which he, the said Doct. Charles McLane, hath in & to said medicines, & doth hereby grant, bargain, & sell unto the said Fleming Brothers, to them & their heirs forever, any interest he hath therein not heretofore transferred to I. Scott & Co., or to Jonathan Kidd by the writing hereinbefore mentioned, & hath further agreed & doth hereby covenant to & with the said Fleming Brothers, their heirs & assigns, that he, the said Doct. Charles McLane, will not manufacture or sell the said medicines, or either of them, or any other medicines of the same kind, or resemblance or similitude, nor otherwise suffer or permit the same to be done by any license or authority from him.

And whereas the said Doct. I. Scott, Enoch P. Fitch, & George M. Hagans have agreed to sell & transfer, & have hereby granted, bargained, sold, & transferred to the said Fleming Brothers, their heirs, executors, administrators, & assigns, the exclusive right to manufacture & sell in the United States & elsewhere the medicines known as McLane's Improved Liver Pills, McLane's Improved Vermifuge, McLane's Improved Lung Syrup, and D'r I. Scott's White Circassian Liniment, & have agreed & do hereby agree & covenant with them not to man-
29 ufacture or sell the said medicines, or either of them, either singly or in partnership, or directly or indirectly not to be engaged or interested in the manufacture or sale thereof, or of any other medicines of the same kind, resemblance, or similitude; and also have agreed to deliver to the said Fleming Brothers all the unsold medicines on hand in their possession, or in the possession of their agents, the same to be delivered where they now are, either in possession or in hands of said agents, agreeing that there is now on hand six hundred gross of said medicines, including what are in the hands of agents, and for each & every gross less than that amount, to account for and pay to the said Fleming Brothers the sum of five dollars; & also have agreed to deliver at the several places where they now are, to the said Fleming Brothers, all the cards, plates, directions, pamphlets, almanacks, and printed matter of every description in their possession relating to the said medicine, or designed or intended to be used for the advertisement thereof; the plates in the hands of Draper, Welch & Co. to remain in their hands according to the understanding with them as to said plates; and also have agreed to transfer & assign over to the said Fleming Brothers all the right, title, & interest they have by virtue of the said transfer
30 of Doct. Charles McLane to them, & have covenanted & agreed to warrant & defend the said Fleming Brothers, their heirs and assigns, in the exclusive manufacture & sale of said medicines against the competition of themselves, or either of them, or by any other person or persons, under their license and authority.

Now, if the said D'r Charles McLane, D'r Isaac Scott, Enoch P. Fitch, and George M. Hagans shall faithfully keep, fulfil, & perform their afore-

said agreements and covenants, then this obligation shall be null and void; otherwise be and remain in full force & virtue.

CHARLES McLANE. [SEAL.]
ISAAC SCOTT. [SEAL.]
E. P. FITCH. [SEAL.]
GEO. M. HAGANS. [SEAL.]

Witness:
BENJAMIN W. L. DORSEY.
W. T. WILLEY.

EXHIBIT E.

Doctor McLane's celebrated Liver Pills, for the cure of hepatitis, or liver complaint, dyspepsia, and sick headache.

In offering to the public D'r McLane's celebrated Liver Pill as a remedy for liver and bilious complaints, we presume no apology will be needed.

The great prevalence of liver complaint and bilious diseases of
31 all kinds throughout the United States, and particularly in the West and South, where, in the majority of cases, the patient is not within the reach of a regular physican, require that some remedy should be provided that would not in the least impair the constitution, and yet be safe and effectual. That such is the true character of D'r McLane's Liver Pills, there can be no doubt. The testimony we lay before you, and the great success which has invariably attended their use, will, we think, be sufficient to convince the most incredulous. It has been our sincere wish that these pills should be fairly and fully tested, and stand or fall by the effects produced. That they have been so tested, and that the result has been in every respect favorable, we call thousands to witness who have experienced their beneficial effects.

D'r McLane's Liver Pills are not held forth or recommended (like most of the popular medicines of the day) as universal cure-alls, but simply for liver complaint, and those sym'toms connected with a deranged state of that organ.

DISEASES OF THE LIVER.

The liver is much more frequently the seat of disease than is generally supposed. The function it is designed to perform, and on the regular execution of which depends not only the general health of the body, but the powers of the stomach, bowels, brain, and the whole nervous
32 system, shows its vast and vital importance to human health.

When the liver is seriously diseased, it in fact not only deranges the vital functions of the body, but exercises a powerful influence over the mind and its operations, which cannot easily be described. It has so close a connection with other diseases, and manifests itself by so great a variety of sym'toms of a most doubtful character, that it misleads more physicians, even of great eminence, than any other vital organ. The intimate connection which exists between the liver and the brain, and the great dominion which I am persuaded it exercises over the passions of mankind, convince me that many unfortunate beings have committed acts of deep and criminal atrocity, or became what fools term hypochondriacs, from the simple fact of a diseased state of the liver. I have long been convinced that more than one-half of the complaints which occur in the country are considered as having their seat in a diseased state of the liver. I will enumerate some of them: Indiges-

tion; stoppage of the menses; deranged state of the bowels; irritable and vindictive feelings and passions, from trifling and inadequate causes, of which we afterwards feel ashamed; last, though not least, more than three-fourths of the diseases enumerated under the head consumption have their seat in a diseased liver. This is truly a frightful catalogue.

33 *Sym'toms of a diseased liver.*—Pain in the right side, under the edge of the ribs, increases on pressure; sometimes the pain is in the left side; patient is rarely able to lie on the left side; sometimes the pain is felt under the shoulder-blade, and it frequently extends to the top of the shoulder, and is sometimes mistaken for a rheumatism in the arm. The stomach is affected with loss of appetite and sickness; the bowels in general are costive, sometimes alternative with lax; the head is troubled with pain, accompanied with a dull, heavy sensation in the back part. There is generally a considerable loss of memory, accompanied with a painful sensation of having left undone something which ought to have been done. A slight, dry cough is sometimes an attendant. The patient complains of weariness and debility; he is easily startled; his feet are cold or burning; and he complains of a prickly sensation of the skin; his spirits are low; and although he is satisfied that exercise would be beneficial to him, yet he can scarcely summon up fortitude enough to try it. In fact, he distrusts every remedy. Several of the above sym'toms attend the disease, but cases have occurred when few of them existed; yet, examination of the body after death has shown the liver to have been extensively deranged.

AGUE AND FEVER.

D'r McLane's Liver Pills, in cases of ague and fever, when taken with quinine, is productive of the most happy results. No bet-
34 ter cathartic can be used preparatory to or after taking quinine. We would advise all who are afflicted with this desease to give them a fair trial.

DIRECTIONS.

Take two or three pills, going to bed, every second or third night. If they do not purge two or three times by next morning, take one or two more; but a slight breakfast should invariably follow their use. The Liver Pills may be used where purging simply is necessary. As an anti-bilious purgative they are inferior to none, and in doses of two or three, they give astonishing relief in sick headache; also in slight derangements of the stomach.

Beware of counterfeits, and articles purporting to be D'r McLane's. The great popularity of D'r McLane's genuine preparations has induced unprincipled persons to attempt palming upon the public counterfeit and inferior articles; in consequence of which, the proprietors have been forced to adopt every possible guard against fraud. Purchasers will please pay attention to the following marks of genuineness:

1st. The external wrapper is a fine steel engraving, with the signatures of C. McLane and Fleming Bros.

2d. The directions are printed on fine paper, with a water-mark, as follows: "D'r McLane's Celebrated Vermifuge and Liver Pills,
35 Fleming Bros., Proprietors." This water-mark can be seen by holding up the paper to the light. The Liver Pills have the name stamped on the lid of the box in red wax.

FLEMING BROS. C. M'CLEAN.

Prepared only by Fleming Brothers, Pittsburgh, Pa., sole proprietors of Dr McLane's Liver Pills and Vermifuge. Copyright secured.

(Here follows the said circular, printed in German, French, and Spanish.)

Exhibit F cannot be inserted in the body of this transcript, and the original, or a copy thereof, will be attached hereto.

EXHIBIT F².

Article' of copartnership entered into this eleventh day of January, A. D. 1854, between John Fleming, Cochran Fleming and Lemuel Wilcox, j'r, to carry on the business of wholesale and retail druggists, witnesseth:

Whereas said John Fleming has succeeded in building up an extensive and profitable business:

Now, therefore, it is agreed that he, the said John Fleming, will take into copartnership with him in said business the above-named Cochran Fleming and Lemuel Wilcox, j'r, to transact said business, under the name and style of "Fleming Brothers," on the following terms, viz:

The said Cochran Fleming and Lemuel Wilcox, j'r, shall de-
36 vote their undivided attention to the business, and each be entitled to receive one-third share of the profits, but shall not be at liberty to draw out of the concern more than two thousand dollars per annum without the consent of said John Fleming, and shall not in any way become endorsers or sureties in any form for other persons.

Said partnership to continue so long as it may be agreeable to the said John Fleming, who it is agreed shall have the right to dissolve the same at any time he may desire, and shall have the right to take their or either of their interests, as the same may be shown to be by the partnership books, and pay therefor one-third in cash, and for the remaining two-thirds to give his individual notes of equal amounts, payable in one and two years.

Said John Fleming agrees, in case of the death of either or both of the other partners, above named, during the existence of this partnership, to continue, with the consent of the personal representative of such deceased partner, the interest held by said partner or partners at the time of his or their death for the term of three years from the date of decease, and at the expiration of said three years will pay over to the personal representative of said decease partner his or their entire interest in the concern, as shewn by the books of the firm, as follows: One-third
37 in cash, the balance in two equal payments in one and two years; and, further, that the family of deceased partner shall be entitled to draw for the family and other expenses the same amounts as previous to his or their death.

It is agreed by all parties that five years shall be the limits of this copartnership, unless sooner dissolved under the foregoing provisions.

It is further agreed that said Cochran Fleming and Lemuel Wilcox, j'r, may either, or both, withdraw from this copartnership at any time, by first giving three months' notice to John Fleming of their intention so to do; and in case of such withdrawal, said John Fleming shall have the right to take the interest of such withdrawing partner on the same terms as above stated, viz, by paying one-third in cash, the balance in one and two years, and give therefor his individual notes.

It is also agreed that in the event of the death of the said John Fleming during the existence of this copartnership, that the surviving partners shall continue the business for the joint benefit of themselves and the estate of said John Fleming, according to the direction of the last will and testament of said John Fleming; but in default of any such directions being given by said last will and testament, then the business of the firm shall be continued by surviving partner or
38 partners, for the benefit of his estate, upon the same terms as is hereinbefore provided for in case of the death of the other partners.

Witness our hands and seals, the day and year first above written.

JOHN FLEMING. [SEAL.]
C. FLEMING. [SEAL.]
LEMUEL WILCOX, J'R. [SEAL.]

Witness:
W. J. BENDER.

In consideration of the sum of seventeen thousand dollars, received by me from John Fleming, to wit: Five thousand dollars in cash, and his two notes, payable to my order, dated August 8, 1857, one in one year after date, and the other in two years after date, for six thousand dollars each, I do hereby release, assign, and relinquish unto him, and his heirs and assigns forever, all my right, title, interest, and claim of, in, and to the property, assets, and effects whatsoever, of the late firm of Fleming Brothers; and I hereby acknowledge to have received satisfaction of all demands which I have against said John Fleming, other than the aforesaid notes.

Witness my hand and seal this 12th day of October, 1857.

L. WILCOX, J'R. [SEAL.]

Sealed and delivered in the presence of—
R. MORROW.

CITY OF PITTSBURGH, *ss:*

Before me, an alderman in and for said city, personally appeared Lemuel Wilcox, j'r, and acknowledged the above instrument of
39 writing to be his act and deed, and desired that the same might be recorded as such.

Witness my hand and seal this 13th October, 1857.

[SEAL.] R. MORROW.

EXHIBIT G.

Be it known that I, John Fleming, of the city of Pittsburgh, & State of Pennsylvania, do hereby make & publish this my last will and testament, in manner following, to wit:

I constitute & appoint Cochrane Fleming, Frank E. Porter, and Alexander Byers, executors of this my last will & testament; & I hereby empower my said executors, the survivors or survivor of them, to sell & dispose of any and all real estate, stocks, & personal property not hereinafter specifically devised or bequeathed, that I may die possessed of, & to apply the proceeds thereof to the payment of the legacies & bequests hereinafter made and contained.

After the payment of my just debts, I direct that my executors shall invest, in the name of my wife, Frederrella Fleming, & for her absolute use & disposal, out of the first moneys that come into their hands, the sum of fifty thousand dollars, the same to be in lieu of dower at common

law, & of her interest under the intestate acts of this commonwealth And I further direct that in making said investment, that no sum greater than ten thousand dollars shall be invested in any one class of securities.

40 I do give and bequeath unto my said wife my warehouse, marked as number twenty-four Wood street, Pittsburgh, to have and to hold for the term of her natural life, & at her death to give and bequeath the same to my brother Cochrane Fleming, to have & to hold for the term of his natural life; and at & immediately after his decease, I give & devise the said warehouse & lot unto the children of said brother Cochran, in fee, share & share alike.

I also give & bequeath unto my said wife all my books, plate, household furniture, clothing, & utensils, beds & bedding, and effects of a similar personal character.

I give & bequeath unto my mother, for the term of her natural life, the use & income of ten thousand dollars; & at her decease, I give & bequeath the said use & income of the said ten thousand dollars unto my brother James Pressly Fleming, the investment of said moneys to be made by said executors; & at the decease of my said brother, I direct that the said sum shall go absolutely to his children; & that if he die leaving no children, or their issue, the same shall go to his heirs at law.

To my sister Mary I give & bequeath the use & income of five thousand dollars, for the term of her life, the investment to be made by my executors; & I direct that at the death of my sister Mary, the

41 said sum shall be held & invested for the use & behoof of my sister M'r's Martha Byers, for her life; & at her death, the same shall go absolutely to her children.

To my sister M'r's Martha Byers, I give & bequeath the use & income for life of the sum of five thousand dollars, the same to be invested by my executors; & at her death I direct the said sum shall be held & invested for the use for life of my brother Cochran, at his death the same to go to his children, share & share alike.

To my brother James Pressly Flemming, I give & bequeath the use & income for the term of his life, of the sum of ten thousand dollars, the same to be invested by said executors & the proceeds paid over by them to my said brother; & at his death I direct that the same shall go absolutely to his children,share & share alike; & that in default of such children or their issue, the same shall go for life to my sister M'r's Eliza Wilcox, & that at her death the same shall go absolutely, share & share alike, to her children.

To my niece M'r's Annie Temple, I give & bequeath the use & income for life, of the sum of ten thousand dollars, the same to be invested by my said executors; & at her death I direct & will that the said sum

42 shall go absolutely to her children, share & share alike; & that should she have no children or their issue, I will & direct that the said sum shall go for life, as invested by said executors, unto her brother, Lemuel North Wilcox; & at his death that the same shall go to his children, share and share alike; & in case he die leaving no children or their issue, I will that the said sum shall descend to his heirs at law.

I give & bequeath unto my said nephew, Lemuel North Wilcox, the sum of five thousand dollars absolutely.

I give & bequeath unto John Fleming Arthur, of Baltimore, the sum of five thousand dollars absolutely.

To my brother Cochran, I give & bequeath the good-will & proprietorship of McLane's & other medicines which I own & control, on the following conditions, to wit:

That immediately on my death he take charge & carry on my said business; and if it is found on examination of my affairs, that my available assets (in which are not to be included the warehouse & articles of a personal character hereinbefore bequeathed to my wife) are not sufficient to provide means wherewith to pay the foregoing pecuniary legacies in the order in which they are enumerated in this my last will, then that he carry on said business for the benefit of my estate until enough of moneys are realized by said business to make good
43 any deficiency in the moneys applicable to the payment of said legacies.

On the payment of said legacies, my other executors will execute & deliver unto my said brother Cochran all bills of sale or conveyance of my said business & property connected therewith, which may be desired by the said Cochran.

All the rest and residue of my estate after the payment of the foregoing legacies, and excepting the foregoing specific devises & legacies, I give unto my said brother Cochran absolutely.

Immediately at my decease, the interest of fifteen per cent. on the nett profits of my business, which I now allow F. E. Porter, shall cease, & a settlement between him & my estate shall be made.

It is my will that my brother Cochran do not part with my business in the manufacture & sale of patent medicines, but keep the same up by a proper system of advertisement & transmit it to his children.

My private books will disclose certain outside investments, in some of which F. E. Porter is jointly interested with myself, & I have so marked them in my said books, so that those of said investments that are exclusiv'ly my own can be designated from those in which the said F. E. Porter has an interest.

44 On the final settlement of the books of Fleming Brothers, in which name my regular books of account are kept, the amount of said outside investments belonging to me alone will be charged against me, & any profits in said investments will be credited to me, and the amount of said outside investments in which said F. E. Porter & myself are jointly interested shall be charged against us in the indicated by my said private books, & all proceeds of said investments credited in like manner.

In testimony whereof I have hereunto set my hand & seal this 21st day of Dec., A. D. 1866.

(Signed) JOHN FLEMING. [SEAL.]

Signed, sealed, published, & declared by the said John Fleming as & for his last will and testament in the presence of us, who have at his request & in his presence, & in the presence of each other have signed our names as witnesses thereto.

GEORGE CALHOUN.
W'M PFAHL.

Exhibit H cannot be inserted in the body of this transcript, and the original or a copy thereof will be attached hereto.

EXHIBIT J.

New directions for using D'r J. H. McLean's Universal Pills.

45 Will cure liver complaint, biliousness, headache, jaundice, costiveness, indigestion, and all such complaints arising from an unealthy condition of the liver, spleen, or stomach.

Don't forget the fact known to thousands upon thousands who have

used them for years, that D'r J. H. McLean's Universal Pills are superior to all other liver and anti-bilious pills. One dose will convince the most skeptical of their searching and restorative powers. They are mild in their operations, producing no griping or pain, prompt in their action, thoroughly cleansing the system from all bilious (effete), offensive, acrid matter, and restoring the healthy secretions of the liver and stomach; try them and you will be convinced. Be sure you have some of D'r J. H. McLean's Universal Pills always on hand. One dose taken in time to open the obstructed passages may save your life.

Dose for grown person is from 4 to 6 pills; you can take 8 pills, if necessary. Children from 1 year to 12 years, one to two pills.

Many who cannot take pills can cut them up, or powder them, and mix with scraped apples, milk, syrup, jelley, or preserves; syrup and sugar taken with pills will make them operate freely. You can take D'r J. H. McLean's Universal Pills any time, no regard to weather or time of day; but they operate more effectually if taken before
46 going to bed. If your tongue is coated, and bitter taste in your mouth, take 6 of D'r J. H. M'Lean's Universal Pills before going to bed, and only 2 pills second night after.

Have you a headache, nervous and restless, take a dose of D'r J. H. McLean's Universal Pills. Have you a pain in your right or left side, or up under your shoulder-blade, low spirits, sallow complexion? It is liver complaint; take a full dose of D'r J. H. McLean's Universal Pills before going to bed, and 2 pills every other night. They will cure you.

To give you strength and rich blood, take with the pills D'r J. H. McLean's Strengthening Cordial and Blood Purifier.

Have you a yellow skin—eyes look yellow? It is biliousness; may be jaundice. Take a full dose of D'r J. H. McLean's Universal Pills, and take 2 pills every other night for a few nights, which will cure you.

To cure costiveness, foul breath, bad taste, internal fever, a full dose of D'r J. H. McLean's Universal Pills first, then every other night 2 pills; this is a sure cure.

Have you caught cold; "all stopped up;" cough and hoarseness? Bathe your feet before going to bed, and take a full dose of D'r J. H. McLean's Universal Pills. You will be as bright as a lark in the morn-

For diarrhea and dysentery take 2 of D'r J. H. McLean's Uni-
47 versal Pills every other night, and to give a healthy tone to the liver, stomach, and bowels take a teaspoonful of D'r J. H. McLean's Strengthening Cordial and Blood Purifier every two hours.

In giving special directions, much will depend on the urgency required. The dose can be increased if necessary.

Be sure to ask for D'r J. H. McLean's Universal Pills; they are the only reliable Liver Pills, and should be always on hand. "A stitch in time saves nine."

Price, 25c. per box, or 5 boxes for $1.00.

Send amount to me in a letter, and I will send them to you.

D'R J. H. McLEAN,
No. 314 Chestnut street, S't Louis, M'o'.

Prevalent diseases for which D'r J. H. McLean's medicines are applicable, and will cure.

Directions around each medicine.

Ague and fever: D'r J. H. McLean's Chinoidine Sugar Pills.

Bad breath: D'r J. H. McLean's Universal Pills.

Biliousness: D'r J. H. McLean's Universal Pills.

Bad cold: D'r J. H. McLean's Universal Pills.
Bad blood: D'r J. H. McLean's Strengthening Cordial.
Babies teething: D'r J. H. McLean's Strengthening Cordial.
Bowel complaint: D'r J. H. McLean's Strengthening Cordial.
Costiveness: D'r J. H. McLean's Strengthening Cordial.
Cholera: D'r J. H. McLean's Strengthening Cordial.
48 Cholic diarrhea: D'r J. H. McLean's Strengthening Cordial.
Chapped skin: D'r J. H. McLean's Volcanic Oil Liniment.
Chilblains: D'r J. H. McLean's Volcanic Oil Liniment.
Cuts, sores, wounds: D'r J. H. McLean's Volcanic Oil Liniment.
Deafness, earache: D'r J. H. McLean's Volcanic Oil Liniment.
Diseases fr. mercury: D'r J. H. McLean's Strengthening Cordial.
Dyspepsia: D'r J. H. M'Lean's Strengthening Cordial.
Falling of the womb: D'r J. H. McLean's Strengthening Cordial.
Female complaints: D'r J. H. McLean's Strengthening Cordial.
Fainting: D'r J. H. McLean's Strengthening Cordial.
Headache: D'r J. H. McLean's Universal Pills.
Heartburn: D'r J. H. McLean's Universal Pills.
Indigestion: D'r J. H. McLean's Universal Pills.
Jaundice: D'r J. H. McLean's Universal Pills.
Liver complaint: D'r J. H. McLean's Universal Pills.
Loss of memory: D'r J. H. McLean's Strengthening Cordial.
Measles: D'r J. H. McLean's Strengthening Cordial.
Melancholy: D'r J. H. McLean's Strengthening Cordial.
Nervous, restless: D'r J. H. McLean's Strengthening Cordial.
Neuralgia: D'r J. H. McLean's Chinoidine Sugar Pills.
Night-sweats: D'r J. H. McLean's Strengthening Cordial.
Pain in bone: D'r J. H. McLean's Strengthening Cordial.
Pimples, blotches: D'r J. H. McLean's Strengthening Cordial.
Piles: D'r J. H. McLean's Volcanic Oil Liniment.
Paralysis: D'r J. H. McLean's Volcanic Oil Liniment.
Rheumatism: D'r J. H. McLean's Volcanic Oil Liniment.
Sunburn, freckles: D'r J. H. McLean's Volcanic Oil Liniment.
Spider bites: D'r J. H. McLean's Volcanic Oil Liniment.
49 Scalds or burns: D'r J. H. McLean's Volcanic Oil Liniment.
Sore throat: D'r J. H. McLean's Volcanic Oil Liniment.
Sour stomach: D'r J. H. McLean's Strengthening Cordial.
Toothache: D'r J. H. McLean's Volcanic Oil Liniment.
Tongue coated: D'r J. H. McLean's Universal Pills.
Urinary diseases: D'r J. H. McLean's Universal Pills.
Ulcers and sores: D'r J. H. McLean's Volcanic Oil Liniment.
Varioloid, small pox: D'r J. H. McLean's Universal Pills.
Vermifuge, nothing equal to D'r J. H. McLean's Candy Vermifuge.
Worms: D'r J. H. McLean's Candy Vermifuge.
Womb diseases: D'r J. H. McLean's Strengthening Cordial.
Yellow fever: D'r J. H. McLean's Universal Pills.

The said exhibit being also printed in German, French, and Spanish.

Exhibit K being a label, cannot be placed in the body of this transcript, and the original, or copy thereof, will be hereto attached.

Exhibit L being a label, cannot be placed in the body of this transcript, and the original, or a copy thereof, will be hereto attached.

And on the said 1st day of June, 1872, a subpœna in chancery was issued, which, with the marshal's return endorsed thereon, is as follows, to wit:

S'p'a in chancery.

MISSOURI DISTRICTS, *set:*

50 The President of the United States to James H. McLean, greeting:

You are hereby commanded to be and appear at rules, to be held at the office of the clerk of the circuit court of the United States for the districts of Missouri, on the first Monday of July next, at the city of S't Louis, then and there to answer the bill of complaint of Cochrane Fleming, a citizen of the State of Pennsylvania, filed against you on the first day of June, 1872; hereof fail not.

Witness the honorable Salmon P. Chase, Chief Justice of the United States, the first day of June, 1872.

Issued at office, in the city of S't Louis, under the seal of said court, the day and year last aforesaid.

[SEAL.] AUSTIN DRAKE, *Clerk.*

MEM.—The defendant to enter his appearance in this suit in the clerk's office, on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso.

AUSTIN DRAKE, *Clerk.*

Return.

THE UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Executed this writ by delivering a copy of the subpœna in chancery, together with a copy of the bill of complaint, to the within-named James H. McLean, at S't Louis, within the eastern district of M'o', June 5th, 1872.

51

C. A. NEWCOMB,
U. S. Marshal, E. D., M'o'.
By W'M H. BIERSTADT,
Deputy.

And afterwards, on the 21st day of June, 1872, the following appears of record in said case, to wit:

COCHRANE FLEMING, PLAINTIFF,
vs } In chancery.
JAMES H. MCLEAN, DEFENDANT.

This day comes the defendant, by his solicitors, Mess'rs Hill and Stratton, and enters his appearance, and files his answer to plaintiff's bill. The said answer being in words and figures as follows, to wit:

Answer.

In the United States circuit court for the districts of Missouri.

COCHRANE FLEMING, COMPLAINANT,
vs.
JAMES H. MCLEAN, DEFENDANT.

The answer of James H. McLean, the defendant, to the bill of complaint of Cochrane Fleming, complainant.

This defendant now, and at all times hereafter, saving and reserving

unto himself all benefit and advantage of exception which can of may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's bill of complaint contained, for an-
52 swer thereunto, or unto so much and such parts thereof as this defendant is advised, is or are material or necessary for him to make answer unto, this defendant answering, saith, that he has no knowledge or information sufficient to form a belief as to whether or not, said complainant is now, and for the last sixteen months, has been extensively engaged individually in the manufacture and sale of a certain pill, designated and known in trade, and by public advertisement, and by dealers and consumers, as "D'r C. McLane's Liver Pills," nor whether said pills have become very extensively known and used in the United States and in other countries, and thereof demands strict proof.

Defendant further answering, says that he has no knowledge or information sufficient to form a belief as to whether or not, as alleged by complainant, "said pills were first made and sold by D'r Charles McLane, at Morgantown, Virginia, where said McLane resided"; nor whether said McLane was the original and exclusive inventor and proprietor of said pills, and first made and sold the same by the name and description, "D'r McLane's Liver Pills;" nor whether by that name they were known and designated, or were made and sold only by said D'r Charles McLane, till June 19th 1844; nor whether said McLane, by bill of sale of that date, sold his interest therein to one Jonathan Kidd, of Pittsburg,
53 Pennsylvania, giving said Kidd the right to make and vend the same in the United States, reserving only the privilege of making and vending the same himself in Morgantown aforesaid; nor whether thereby said Jonathan Kidd became the sole owner and proprietor thereof, with the exclusive right to make and sell the same, and to use the name thereof, excepting only the personal privilege reserved as aforesaid; nor whether thereupon said Kidd began at Pittsburgh, Pennsylvania, the manufacture and sale of said pills, according to the receipt of said D'r McLane; nor whether he continued such manufacture and sale at said place till about the 11th day of April, A. D. 1845, when plaintiff alleges said Kidd to have formed a partnership with one John Fleming, under the name and style of John Kidd & Co.; nor whether said Kidd invested said firm with the full right to make and sell said pills, and to use the name thereof; nor whether said firm engaged largely in the business of making and selling said pills; nor whether, in order to designate the same as an article of their own manufacture, and to prevent imposition and fraud upon the public and persons desiring to purchase the same, said firm, during and before, in the year 1847, commenced putting up said pills in wooden boxes of uniform size,
54 shape, and appearance, having perpendicular sides, with top and bottom of elliptical shape, each box containing twenty-two pills, and caused the words "McLane's Liver Pill" to be stamped in red wax upon the cover of each box; nor whether, in pursuance of their said design to designate said pills as the genuine article so manufactured by them as aforesaid, said firm procured at their own expense certain plates, and caused to be made therefrom a certain token, label, or trade-mark, consisting of a wrapper which was placed by them around each box of pills, and which was printed with ink of a light red color; the portions thereof covering the top of each box being engraved with a narrow border of scolloped pattern, surrounding a panel of background with waveline engraving, and with the words, "Dr. McLane's Celebrated Liver Pills. In sick headache and all bilious complaints surpassed by none. Price 25 cts.," engraved thereon, and appearing in white letters, shaded

by red lines; nor whether, on the portion of said wrapper covering the rear side of the box, a panel of similar background, surrounded by a border of dark and light red, and white lines appearing interlaced or interwoven, and with the words following, to wit, "In future my genuine liver pills will have a red steel engraved wrapper, and my name in red wax on each box," appearing thereon in white
55 letters shaded by red lines, and having also a fac-simile of the signature of C. McLane engraved and printed in red ink at the bottom thereof; nor whether upon that portion of the said wrapper covering the front side of the box a panel, with border and background similar to that last mentioned, having the words, "Prepared for the proprietor by J. Kidd & Co., No. 60 Wood street, Pittsburgh, Pa.," thereon in white letters shaded with red lines, and also the words, "None can be genuine without the signature of Jon'n Kidd & Co.," being a fac-simile of said firm's signature, one of which labels or trade-marks was placed on and around each box of said pills made and sold by said firm; nor whether said firm pretending to be the sole and exclusive owners of said pills, & of the receipt for making the same, and of the said label *label* or trade-mark, and the plates for the same, and that they have exclusively made, put up, and sold said pills, and said label and trade-mark thereon, and brought the same into notice, or by the expenditures of large sums of money in advertising, and by the exercise of energy and skill, they gave to said pills a wide and enviable reputation, or derived from the manufacture & sale thereof large profits. And of all said allegations & statements defendant demands strict proof.

56 Defendant, further answering, says that he has no knowledge or information sufficient to form a belief as to whether, on the 29th day of M'ch, 1853, said Jonathan Kidd died, leaving the said John Fleming the sole surviving partner of said Jon'n Kidd & Co., who continued the business; nor whether, about the 30th day of April, 1853, the executors of said Jonathan Kidd, for the sum of thirty-four thousand dollars, and other considerations, conveyed to said surviving partner, John Fleming, and to complainant jointly the right, title, interest, & claim of said Jon'n Kidd in & to the goods, chattels, bonds, notes, accounts, claims, rights, and credits of every description belonging to said late firm of Jon'n Kidd & Co., in the drug business in Pittsburgh aforesaid; nor whether said John Fleming and complainant formed a partnership under the firm name & style of Fleming Brothers; nor whether, under said bill of sale, said John Fleming and Cochrane Fleming, composing the firm of Fleming Brothers, at once took possession of the business of making and selling said D'r C. McLane's Liver Pills, and of said plates, tokens, labels, and trade-marks, or thereby became the exclusive owners of the same, and of the right to make and sell the same, with the said tokens, labels, and trade-marks thereon, except the right reserved to said D'r Charles McLane; nor whether about
57 January 11th, 1854, Lemuel Wilcox, j'r, became a partner in said firm of Fleming Brothers; nor whether afterwards said D'r Charles McLane relinquished to said Fleming Brothers all his right thereto, or further recognized and confirmed to said Fleming Brothers the full and exclusive right in said pills, labels, & trade-marks, by contract dated January 8th, 1857, marked "D," and filed with complainant's bill; nor whether said firm of Fleming Brothers greatly enlarged the business of making and selling said pills until the year 1855; nor whether, since which time until the year 1872, while putting them up in boxes of the same material, size, & shape as already described, and placing a seal with the words "McLane's Liver Pills" stamped with red wax upon the

cover of each box containing said pills, as before described; nor whether they folded around each box a circular containing remarks upon the nature and effects of said pills, and the deceases for which they were recommended, with directions for their use printed in the English, German, French, and Spanish languages; nor whether a true copy of said circular is filed, marked "E," with complainant's bill; nor whether they procured new steel plates, & caused to be printed therefrom labels or trade-marks, forming an external wrapper, consisting of a fine
58 steel engraving, with a fac-simile of the signature of C. McLane, and said firm of Fleming Brothers engraved thereon; nor whether the ground-work of said engraved wrapper on the top of the box was composed of fine lines crossing the box diagonally and at right angles with each other, and the words "D'r C. McLane's celebrated Liver Pills. In sick-headache and in all bilious complaints surpassed by none. Price, 25 c'ts," engraved thereon; nor whether said engraving showed the letters and figures in white; nor whether the said words "Celebrated Liver Pills" were on a scroll similar to a double ogre in form, with black background; nor whether on said wrapper said firm caused to be engraved and printed the words, "Prepared only by Fleming Bro's, successors to John Kidd & Co.," all in white letters; nor whether a fac simile of their signature in black, and the words "Without whose signature none can be genuine," were printed in black letters; nor whether on the opposite side of said boxes were printed othar words, as follows: "In future my genuine liver pills will have a fine steel-engraved wrapper, and my name in red wax on each box, with a fac-simile of the signature of C. McLane in black script"; nor whether a copy of such label is attached to plaintiff's bill, marked "F."

59 This defendant, further answering, says that he has no knowledge or information sufficient to form a belief whether said firm of Fleming Bro's carried on the making and selling of said pills, with the said labels, tokens, and trade-marks thereon, from the said 30th day of April, 1853, in their said firm-name; nor whether said firm from said day owned and held among their firm assets the right to make and sell said pills and use thereon the said labels, tokens, and trade-marks, and this defendant avers that the said firm of Fleming Bro's did not use the same trade-mark, or the same labels or tokens, but, on the contrary thereof, changed their labels and tokens and pretended trade-marks whenever it suited their convenience, and thereby all right, claim, or interest to either one of the different labels, tokens, and trade-marks upon said pill-boxes of the same kind of pills became null and void as a trade-marks, excepting only the last token or label used in point of time as such token, label, or trade-mark; provided the same were new and had never been used by any other person before the date of the last adopted label or token to be used as a trade-mark.

This defendant has no knowledge or information sufficient to form a belief how long said firm of Fleming Bro's carried on the business of making and selling pills, nor how often they changed their said
60 labels or trade-marks; nor whether on the 11th day of January, 1854, Samuel Wilcox, j'r, became a member of said firm; nor whether said firm was composed of John and Cochrane Fleming and said Wilcox; nor whether said firm ever existed, either before or after the 12th day of October, 1857; nor whether said Samuel Wilcox, j'r, then withdrew from said firm, nor what consideration, if any, was paid to said Wilcox; nor whether said Wilcox ever conveyed to John Fleming any right, title, interest, or claim in or to any property, assets, or effects of said pretended firm of Fleming Bro's; nor whether such firm

ever existed; nor whether any right to make and sell said pills ever was sold or conveyed by said Wilcox to said Fleming Bro's as stated in complainant's bill and exhibit marked "F²"; nor whether any such tokens, labels, or trade-marks as now claimed by the complainant to be existing had any existence as tokens or trade marks in 1853, or in 1854, or in 1857, or on the 1st day of July, 1865, or on the 2d day of November, 1870, or at any other time prior to the filing of this bill of complaint.

And defendant, further answering, says that he has no knowledge or information sufficient to form a belief whether John and Cochrane Fleming carried on a firm business to make and sell pills, having any existing trade-mark thereon, between the 12th day of October, 1857, and
61 the 1st day of July, 1865; nor whether Cochrane Fleming then withdrew from said firm; nor what consideration, if any, he was paid for his interest therein; but this defendant denies that said Cochrane Fleming sold to said John Fleming at any time any trade mark or marks of or concerning said pills or pill-boxes, or labels thereon.

And this defendant denies that Cochrane Fleming sold to John Fleming all or any part of any interest, right, title, claim, property, or assets of said firm of Fleming Bro's.

And this defendant has no knowledge or information sufficient to form a belief whether said John Fleming, under the firm name of Fleming Bro's, continued to carry on the business of making and selling and putting up said pills, as stated in the bill, at Pittsburgh, Pa, or elsewhere, up to the 2d day of November, 1870, or any other time; nor whether John Fleming died, or left his last will and testament; nor whether a copy of it is filed as the will marked "G"; nor whether he bequeathed to the complainant the good-will and proprietorship of McLane's or other medicines; nor what medicines were owned and controlled by John Fleming; nor whether said will included said Liver Pills, or the right to make, put up, and sell the same; nor whether any conditions were annexed to said will, requiring the complainant to
62 pay off legacies given by said will; nor whether the complainant has done so; nor whether John Fleming bequeathed to the complainant, after the payment of said legacies, all the residue of his estate; nor whether the complainant thereby became the owner and proprietor of said pills and the recipe for making the same, but this defendant denies that the complainant, under said will, became entitled to said labels, tokens, and trade-marks.

And this defendant denies that the alleged right to make and sell said pills, and to use said labels, tokens, and trade-marks stated in the bill of complaint, obstruct or preclude this defendant from making and selling his pills, and using his labels, tokens, and trade-marks, under his own name, at the city of St Louis, Missouri.

And defendant further denies the right of complainant to recover any damages or profits against this defendant, whether they accrued to John Fleming in his life-time, or to said firm of Fleming Bro's.

And this defendant denies that complainant, since the death of said John Fleming, has continued or still continues the said business of making and selling said pills and using thereon the said label and trade-mark under the name of Fleming Bro's. And defendant denies that complainant is now using said labels as shown by Exhibit F.

Defendant has no knowledge or information sufficient to form a
63 belief whether the complainant is using the label on his pill boxes, with the exception stated in the bill, nor whether he has used or now uses as a ground-work on his labels the shaded, curved lines, cutting and crossing each other so as to produce the effect of alternate light

and shade, crossing the top of the box diagonally instead of straight lines, as stated in the bill; nor whether he omits now on his labels the former words, "successors to John Kidd & Co."; nor what number he substituted on his label; nor whether he now puts a United States stamp of proprietary revenue on the bottom and ends of his pill-boxes.

This defendant denies that complainant is in whole or in part either the owner of said pills or of the recipe for making the same, or of said tokens, labels, or trade-marks as stated in his bill. And defendant denies that complainant has any exclusive right in using his trade-mark to prevent or exclude this defendant from using another and different label and trade-mark in his own individual name. Defendant denies all intent to injure or defraud the complainant, or to reap any advantage, benefit or profit from the credit or reputation of said complainant's pills.

Defendant denies that he has ever been engaged in making any spurious, inferior or counterfeit pills, or that he has prepared an inferior article of pills in imitation of, or calculated or intended to be
64 sold as a pill made under the name of "Dr. C. McLane's Liver Pills," of complainant's manufacture.

Defendant denies the libelous and scandalous charge that he has placed on his pills a false, forged or counterfeit token, label, or trade-mark; he denies that defendant's label or trade-mark is made in imitation of, or that it closely resembles, that of complainant; and defendant denies that if he had done so by accident or by reason of the general similarity between the great number of pill-boxes in the world, that he would be able to reap any benefit or profit from the credit or reputation of C. McLane's liver pills, alleged to be sold now by the complainant.

Defendant denies that complainant's pill is genuine, [and avers that many better pills than complainant's to be upon an analysis have been prescribed by physicians, and put for sale for fifty years last past.]

Defendant denies that complainant's pills have any reputation based upon any other ground than the false, egotistical, and absurd recommendation of the C. McLane Liver Pill, by the complainant and his predecessors, who may have gulled the public by such false & fraudulent misrepresentations, but it is very probable that the public have found out for many years past that the C. McLane Liver Pill is made
65 up after an old and abandoned prescription, concocted east of the mountains of Virginia, and that it is wholly unfitted and inefficacious for the treatment of the fevers and miasmatic disorders of the valley of the Mississippi and its tributaries.

[The peculiar qualities of the defendant's pills, as opposed to the spurious and worthless pills of the complainant, consists in their adaptation to the use of the inhabitants of the Mississippi Valley, whose diseases are of a different type from those of the Atlantic seaboard, and in the further fact that the defendant has made an exhaustive analysis of the diseases of the said valley, and of the effect of its miasmatic fevers upon the constitutions of the people, and having exhausted, as far as possible, all the resources of the science of medicine to the extent of his ability, and upon consultation with many of the most eminent professors of medicine, and upon a great number of experiments and hospital experiences during the late war, this defendant has perfected his present great Universal Pill. And during the last twenty years the defendant has been engaged in perfecting his said Universal Pill,] and has had no idea that he was infringing upon the claims, trade marks, oblong boxes, red dia-

mond diagonal squares, steel plates, and other trappings of the
66 C. McLane Virginia Pill, [made from said old abandoned prescription, and wholly worthless for use in the valley of the Mississippi.]

Defendant denies that he has deceived the public by his labels, stamps, trade-marks, prescription, directions, and advertisements, in the public prints, in regard to his own or the C. McLane pills. Defendant denies that he has done any act in regard to his own pills and the public, other than to recommend them as the best pills ever produced for the use of the people of the Mississippi Valley.

Defendant, who had heard of C. McLane's pills often, knew nothing of the C. McLane's pills from analysis thereof until the complainant became aware, a short time ago, that his pill was no longer used in this climate [where its effect has been, in defendant's opinion, impervious in its action upon the liver, kidneys, and spleen, and, in defendant's opinion, inducing the approach of jaundice and diseases of the kidneys], and began to complain that defendant was infringing upon him.

It would ruin the defendant in his trade, which has now become very large and general, to attempt to counterfeit the complainant's or any other pill-maker's trade-mark.

Defendant avers that he seals his pill-boxes in red wax or green wax, or any other wax of any style, size, or appearance, and de-
67 nies that he has attempted to imitate in his seal, or his circulars, or his advertisements, the miserable firm's styles or appearances of the boxes that contain the [worthless & obsolete] pills of the complainant.

Defendant denies that his stamp on the red wax of the boxes is made in faint or obscure letters, or illegible ones. Defendant's name and place of business, at 314 Chestnut street, S't Louis, Mo., appears everywhere, on the boxes, on the labels, on the advertisements, in the circulars, in the accounts, and in the receipt of his agents & customers for the pills sold.

And defendant says it is not true that he has, by any device, token, trade mark, label, circular, advertisement, or otherwise, ever attempted, by any means, art, act, sign, token, representation, or device, to imitate in any manner the tokens, labels, devices or trade-marks of C. McLane's [worthless and obsolete] pills, as complainant pretends in his bill of complaint.

And defendant avers, in answer to the many false, fraudulent, libelous, and unjust averments of the complainant in his bill, concerning the change of color, the printing of labels, shape of pill-boxes, the obscurity of lettering, the diseases for which the pills manufactured by the def't could be used, the color of wax stamped on the boxes, & other matters so frequently repeated in complainant's bill, that the complain-
68 ant well knows each and every of said pretenses and averments in his bill is false and libelous, made for the purpose of injuring the defendant's Universal Pills, and of advancing the sales of the complainant's worthless and obsolete pills, the sales of which can bring the complainant no profit when the real demerits of his pills are known.

Defendant denies all illegal and wrongful acts charged against him; he denies all fraudulent designs charged against him; he denies any intent or desire to draw complainant's trade to himself by the use of said alleged fraudulent imitations of tokens, labels, and trade-marks; and defendant aver that all tokens, labels, or trade-marks used by him prior or subsequent to the year 1855 were not used in imitation of, or in order to resemble, any token, label, or trade-mark ever used or owned by Jon-

athan Kidd & Co., C. McLane, Fleming Brothers, Cochrane Fleming, or any other person.

And defendant denies that he procured the said label marked "L" to deceive any one, and used it only for the purposes hereinbefore expressed.

And defendant denies that he changed his labels at any time for the purpose of imitating any change of label at any time made by the complainant or either one of his predecessors; and this defendant has never changed his labels in form, substance, color, or otherwise,
69 except for the purpose of making his personal proprietorship of his pills & trade-marks more clear and intelligible to the people [and to protect the people from being imposed upon by the worthless pills of complainant and his predecessors, and all the other legion of pill-makers, whose worthless trash has been imposed upon the public for many years past, at the cost to the people of millions of dollars and at the sacrifice of many thousands of lives. The introduction of defendant's Universal Pills, made of the choicest chemical and vegetable ingredients, was designed expressly to protect the people from quacks and many other pretenders.]

Defendant denies that he knew or *could* that the complainant or his predecessors were or are the sole or exclusive owner & proprietors of said D'r C. McLane's Liver Pills, or of the labels or trade-marks marked "B" & "F," in said bill.

Defendant denies that he ever knew his own labels & trade-marks to be counterfeits or imitations of complainant's labels or trade-marks, or that he made or contrived them with intent to deceive the public, or any purchasers thereof, or to defraud the complainant.

And defendant says, in answer to interrogatory first, that he admits that he made & sold pills put up in wooden boxes with an im-
70 pression stamped in red sealing-wax on the cover of each box, with a circular, the same as Exhibit J, placed around each box, and all enclosed in a wrapper or label of which Exhibit L is a copy.

Defendant first began to use these labels, stamps, & envelopes, Exhibits J & L, as near as he can now remember, in the year 1853. Defendant is not now able to state how many of such were sold, at what average price, or at what profit. The period of time which the same was sold by defendant was from 1853 to 1872, and defendant avers that it is not important or material, until this court may or' an account, to require defendant to answer those portions of the interrogatory which have reference to the number of pill-boxes and pills put up therein, the quantity sold, and the period during which the sales continued, and the profits made. If the court refuses to order the defendant to account, these portions of the interrogatory are immaterial.

This defendant, for answer to the second interrogatory of complainant's bill, says he admits that, within the last five years & for a longer period, he has been engaged himself, and by his agents and servants, in making, putting up, and selling his pills, which he prepared for market by putting them up in wooden boxes with an impression stamped
71 in red sealing-wax and also in green sealing-wax, from May 20th, 1872, stamped on the cover of each box, and placing around each box a circular, which defendant supposes is a copy of Exhibit I, although no copy of said Exhibit I has been served on this defendant, and defendant enclosed the whole in a wrapper consisting of a label or trade-mark; but this defendant denies that it was in imitation of or closely resembling the pretended label or trade-mark of complainant, and defendant supposes that the true character of his own label or trade-mark, pill-

boxes, and wrappers is shown by Exhibit K of complainant's bill, but he has not examined said exhibit, and no copy has been served upon him; and defendant further says, in answer to this interrogatory, that he began to use said label, as near as he can now remember, about the year 1853; that he does not remember the time when he changed from said label L to label K of complainant's exhibits.

Defendant does not now know & could not state, without a long and laborious examination of his books & accounts, what number of boxes of pills were so put up having said labels thereon nor how many have been sold, nor the amount of average prices or average profits, and unless the court should order an account to be taken, said matters
72 last mentioned would be immaterial. And defendant denies that the complainant is entitled to an account, or to any profits in the premises, or to any order or injunction, or to any relief, or to any aid from this court sitting in equity.

This defendent, further answering, says he has no knowledge or information, sufficient to form a belief, whether the person whose name of C. McLane, as stated in the bill, ever was a doctor of medicine or ever practiced medicine at any place, and defendant requires proof thereof. Defendant further says he denies that the pills labelled Doctor C. McLane's celebrated Liver Pills ever were celebrated for any purpose, and he denies that they have any medicinal virtues, or that they ever came into general use, as claimed in the complainant's bill.

This defendant, further answering, says that he first heard of the said pill purporting to be made by D'r C. McLane in the year 1854. This defendant, fearing that the said D'r C. McLane's so-called celebrated Liver Pills were a spurious imitation of the pills of this defendant, called the Universal Pills, gave general notice through the principal newspapers of the valley of the Mississippi as follows: "To be sure to ask for D'r McLean's Universal Pills," and published a great mul-
73 titude of circulars containing the same caution, and affixed defendant's name and residence to the said circulars; and in order to prevent the possibility of any person using the said pills of C. McLane, who wished to use the defendant's pills, and to prevent any person from using said defendant's pills who desired to use said C. McLane's pills, this defendant caused to be printed at the head of the directions for using his own pills the following words, in conspicuous capital letters, to wit:

"NEW DIRECTIONS FOR USING D'R J. H. M'LEAN'S UNIVERSAL PILLS."

And this defendant also caused to be printed in conspicuous letters on the label enveloping the pill-box of this defendant's pills the following words, lithographed upon the label, to wit:

"To prevent counterfeiting, I have change' the color of my label.—Dr. J. H. McLean."

"Dr. J. H. McLean's Universal Pills or Vegetable Liver Pills, prepared only by D'r J. H. McLean, No. 314, Chestnut street, S't Louis, Mo."

"For the cure of liver complaint, headache, bilious diseases, &c. English and German directions around the box."

This defendant, further answering, says that in changing the color of his label aforesaid the defendant caused the same to be lithographed with a black ground, and the said sentences printed thereon are
74 of conspicuous white letters, so as to prevent, as far as possible, the use of said C. McLane's pill in lieu of the said pills of this defendant, and to give the public full notice by advertisements in the newspapers, and by printing in a conspicuous place upon each wrapper of his pill-boxes, and upon the directions accompanying the pill-box, the

aforesaid notice and notices, with a view to prevent, in good faith, any person or persons from buying his said pills in lieu of the said pills of C. McLane, [which are, in defendant's opinion, worthless articles in comparison with the pills of this defendant, which are really and truly celebrated throughout the United States by reason of a long and satisfactory use of them by the people, who know his name and place of business, as stated above, and have confidence in the purity of all the ingredients used in his compounds, and that defendant's chemical laboratory is one of the most perfect in the United States, and that he has the assistance and advice of some of the ablest physicians and chemists in the preparation of the said pills and various other medicinal prescriptions.]

And this defendant denies that there is any real resemblance between the labels enveloping his pill-boxes and the labels enveloping the pill-boxes of the said C. McLane; and this defendant denies that said label on his pill boxes, or any impression of was on said boxes, is
75 any violation or infringement of any trade-mark of C. McLane aforesaid, or of Fleming Bros. aforesaid, or of John Kidd & Co., Pittsburgh, Pa., or of any other person or persons, or of said complainant. And this defendant avers that he had no intention, when he commenced making said pills and offering them for sale, to appropriate, use, or apply the trade mark of any person named in complainant's bill.

This defendant further says that he commenced carrying on the family-medicine business as one of the proprietors of the Mexican Mustang Liniment, in 1850, at the city of S't Louis, and in the same year this defendant commenced putting up and selling his Universal Pills aforesaid; and in regard to the method of securing the pills from moisture, and enveloping the boxes with paper to secure the desired effect, and to give notice to all the world on each of his said pill-boxes that this defendant was the proprietor, in the city of S't Louis, at successive places—northeast corner of Pine & 3d, at northwest corner of O'Fallon & Broadway, and No. 314 Chestnut street; this defendant avers that he has the inalienable right to the trade-mark containing his own name and residence and the name of his Universal Pills, and that the complainant has no interest, right, or title thereto by reason of any
76 of the pretended, fictitious, and assumed resemblances between the said respective pill-boxes, labels, seals, or stamps.

And this defendant claims the right to make his said pills, to put them into wooden boxes, to seal said boxes in his own name with any colored wax he cho'ses, and to envelope the said boxes with any sort of paper he chooses to use, and to place on said boxes any labels necessary to designate the nature and quality of the pills, provided this defendant places upon said labels and directions enveloping the pill-box & containing it his own name in conspicuous letters and his place of business, so that no person of ordinary prudence, judgment, care, or diligence could be mistaken as to the printed name of the owner, the quality and nature of the pills, and of the manufacturer and compounder thereof, & the city where they were made.

And this defendant, having fully answered all the allegations and interrogatories in complainant's bill to the best of his knowledge, remembrance, information, and belief, and it appearing that the complainant has no just or equitable claim or complaint against this defendant on account of any matter or thing in his said bill of complaint stated or charged, this defendant prays the court that the complainant's bill be dismissed with costs.

BRITTON A. HILL,
Of Counsel & Solicitor for Dft, with whom is T. W. Straotn, Solicitor.

77 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

James H. McLean, of lawful age, being duly sworn, on oath, says that he has heard the foregoing answer read, and knows the contents thereof, and the same is true to the best of his knowledge, information, and belief.

J. H. McLEAN.

Subscribed and sworn to before me this 20 day of June, A. D. 1872.
GEORGE J. DORRIS,
United States Commissioner for Missouri Districts.

And afterwards, on the 1st day of July, 1872, the complainant filed his exceptions to part of defendant's answer as follows, to wit:

Exceptions to parts of answer.

In the United States circuit court, in & for the districts of Missouri.

COCHRANE FLEMING, COMP'NT,
vs.
JAMES H. McLEAN, RESP'D'T.

Exceptions to parts of answer of respondent for impertinence.

And now comes said Cochrane Fleming, complainant, by his solicitors, and excepts to parts of defendant, and avers that the following parts of said answer, as hereinafter designated, are irrelevant, immaterial and impertinent to the issues tendered by the said bill, to wit:

78 1st. Beginning on page 15 of said answer, with the 3rd line from the bottom thereof, with the words, "and avers that many better pills," and ending with the words, "for fifty years last past," on the 3d line from the top of the 16th page thereof.

2nd. Also, all that part of said answer beginning on the 16 page of said answer, in the 5th line from the bottom thereof, with the words, "the peculiar qualities of the defendant's pills," and ending with the words, "perfecting his said Universal Pills," in the 5th line from the bottom of the 17th page thereof.

3d. Also, the words "made from said old abandoned prescription, and wholly worthless for use in the valley of the Mississippi," beginning in the 1st line of the 18th page thereof.

4th. Also, beginning with the words, "when its effect has been," in the 23d line of the 18th page thereof, and ending with the words, "diseases of the kidneys," in the 29th line of the 18th page thereof.

5th. Also, the words "worthless and obsolete," in the 5th line of the 20th page thereof.

6th. Also, the words, "worthless and obsolete," in the 26th line of the 20th page of said answer.

7th. Also, all that part of said answer beginning with the words, "and to protect the people," in the 8th line of the 22d page thereof, and ending with the words, "and many other pretenders," in the 24th line of the 22d page thereof.

79 8th. Also, all that part of said answer, beginning with the words, "which are in defendant's opinion," in the first line of the

28th page thereof, and ending with the words, "and various other medi cinal prescriptions," in the 11th line of the 29th page of said answer.

And complainant avers, that the several parts of the answer above referred to and specified are each and all immaterial, irrelevant, and impertinent to the issues in said cause, and he asks that the same, and all and each of them, be stricken out of and expunged from the said answer for the reasons aforesaid.

M. L. GRAY, and
GEO. DENNISON,
Solicitors for Compl'nt.

NOTE.—The parts of said answer excepted are enclosed in brackets.

And afterwards, on the 5th day of August, 1872, the following appears of record in said cause, to wit:

COCHRANE FLEMING, PLAINTIFF,
vs.
JAMES H. MCLEAN, DEFENDANT. } In chancery.

This day comes the plaintiff by his solicitors, whereupon the exceptions filed to defendant's answer were argued by said solicitors, and submitted to the honorable Samuel Treat, on' of the judges of this
80 court, and being now fully advised in the premises, the said judge orders that said exceptions be, and the same are hereby sustained, and thereupon said plaintiff, by his solicitors, files his replication to said answer of said defendant.

And the said replication so filed as aforesaid is as follows, to wit:

Reply.

U. S. OF AMERICA:

In the United States circuit court, for the district, of Missouri. In chancery.

COCHRANE FLEMING, COMPL'NT,
vs.
JAMES H. MCLEAN, DEF'T.

This repliant, saving and reserving to himself all manner of advantage of exception to the manifold insufficiencies of the answer of defend ant herein, for replication thereunto say, that they will aver & prove their said bill to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant
81 is now and will be ready to aver and prove as this honorable court shall direct, and humbly pray, as in and by his said bill he has already prayed.

M. L. GRAY & DENNISON,
Sol's for Compl'nt.

And afterwards, to wit, on the 1st day of June, 1874, this cause coming on to be heard, the complainant to sustain the issues on his part read the following depositions, to wit:

D'r CHARLES McLANE deposeth and saith:

Ques. Please state your name, age, occupation, and residence.

Ans. My name is Charles McLane. I am now almost eighty-three years of age; by occupation, am a retired physician; have been for quite a number of years. I live in Morgantown, Monongalia County, West Virginia.

(A. H. Clark, complainant's attorney, here produced a paper marked "Exhibit K, J. H. B." attached hereto and made a part of these depositions, and requests the witness to state what he knows about it, with regard to signatures, &c.)

Witness states: The signatures to the exhibit marked "K, J. H. B." are genuine, and the first one is my own signature and in my own handwriting. The body of said exhibit is in the handwriting of Jonathan Kidd, down to the third line from the bottom, where the words, "In witness whereof, &c.," appears, which are in my handwriting to
82 the close. The signature of Jonathan Kidd written Jnb. Kidd is genuine, and in his own handwriting. I am well acquainted with said Kidd's handwriting and signature.

(The commissioner here marks said exhibit with his own initials "A. G. S." for the purpose of further indentification.)

I originally issued, made, and used in my own practice for more than ten years, prior to and up to June 19th, 1844, the date of said exhibit marked "K, J. H. B." & "A. G. S." the pills mentioned in said Exhibit K, J. H. B. & A. G. S. to the best of my recollection, and they became popular and in great demand in that time. And after that date, June 19th, 1844, Jonathan Kidd carried on the manufacture and sale of said pills under my recipe, as I understood and believed. I put up said pills in wooden boxes and labelled them D'r McLane's Liver Pills, and so sold them. I have no pecuniary interest whatever in the result of this suit.

Exhibit K, J. H. D. & A. G. S. attached to said deposition is as follows, to wit:

MORGANTOWN, V'A, *June* 19, 1844.

Article of agreement made this day between D'r Cha's McLane, of the one part, and Jon'n Kidd of the other part, witnesseth:

D'r Cha's McLane of the first part has sold the resipe for mak-
83 ing the medicine called D'r McLane's American Worm Specific, also his interest in the Liver Pill and Lung Syrup to make and vend in these United States, with the privilege of making and vending himself, in Morgantown, V'a. The sum said Jon'n Kidd gives the doctor of the first part, is three hundred dollars a year, for three years, in all nine hundred dollars. The doctor binds himself to sell said right to no other person. J. Kidd binds himself to pay said amount annually, except death should occur, and his business should be discontinued.

In witness whereof, the parties to these presents have hereunto set their hands & seals.

Dated as above.

CHARLES McLANE. [SEAL.]
JOH'N KIDD. [SEAL.]

Lemuel Wilcox' deposition of August 25th, 1873.

Interrogatory 1. State your name, age, place of residence, and occupation.

Answer. My name is Lemuel Wilcox. My age is fifty-seven. My occupation is mining ore in the State of Michigan.

Interrogatory 2. Look at Exhibit L, marked "J. H. B." and S. C. Schrayer, attached hereto, and state if the signature as attesting witness is in your own proper handwriting.

Answer. My name as attesting witness is my own proper handwriting.

The signature of the other attesting witness is known to me as
84 the handwriting and signature of A. Ingram, j'r, now deceased.

I am familiar with the signatures of Jon'n Kidd and John Fleming, parties to said paper Exhibit L, and know them to be in their respective handwriting, and were signed in my presence.

Lemuel Wilcox' deposition, taken December 17th, 1872.

Interrogatory 1. State your name, age, residence, and occupation.

Answer. My name is Lemuel Wilcox. I am fifty-seven years of age. I live in Pittsburgh, Allegheny County, Pennsylvania. I was in the drug business up to 1860, and since that time I have been engaged in other business.

Int. 2. Were you heretofore examined in this case; and when, and where, and why?

Ans. I was examined in Chicago on December 5th, last. I did not expect to be here on the 16th of this month, and my testimony was taken for that reason at Chicago.

Int. 3. State whether you wish to make any correction of your answer there made to an interrogatory then propounded.

Ans. Yes; in my answer to interrogatory 10, I stated "the printed paper marked 'Exhibit E,' accompanies each box." I was mistaken in that; the paper which does accompany each box I now attach, marked "S, J. H. B."

85 Int. 4. Look at "Exhibit L, J. H. B.", and state whether the signature attached thereto, as one of the attesting witnesses, is yours.

Ans. It is.

Int. 5. Do you know the signature of the other attesting witness and of the parties to the paper?

Ans. I do. The witness was A. Ingram, j'r, now deceased. The writing to the paper is the proper handwriting of Jonathan Kidd and John Fleming. At the time I signed this paper my father was living, whose name was the same as mine, and I then signed my name "j'r." Since his death I have dropped the use of "j'r," which has been adopted by my nephew, I believe.

Int. 6. Look at "Exhibit M, J. H. B.," and state whether your signature is attached to the instruments on this paper as a party to them.

Ans. It is.

Int. 7. Do you know the handwriting of the other parties to the first paper on Exhibit M?

Ans. I do. They are the handwriting of John and Cochrane Fleming.

Cochrane Fleming—Deposition of.

Interrogatory 1. State your name, age, place of residence, and your occupation.

Answer. My name is Cochrane Fleming; my age, forty-five years. I live at Sewickley, Allegheny County, State of Pennsylvania. My
86 place of business is Pittsburgh, Allegheny County, State of Pennsylvania. My business is the manufacture of McLane's Liver Pills and Vermifuge.

Int. 2. Under what name and style do you carry on the said business?

Ans. Fleming Brothers.

Int. 3. Have you any partners?

Ans. No, sir.

Int. How long have you carried on the said business without partners?

Ans. Since 1870.

Int. 5. By whom was the said business carried on prior to 1870, and how did your interest in the business then vest?

Ans. My brother, John Fleming, carried on said business in the name of Fleming Brothers, F. E. Porter having an interest in the profits, prior to 1870. My brother John Fleming died in 1870 and left me the business by his will.

Int. 6. Can you produce a copy of said will?

Ans. I can; here it is.

(The will produced is hereto attached and marked "Exhibit G, J. H. B.," purporting to be a certified copy thereof.)

Int. 7. Since you carried on the business individually has the business been conducted on a large scale, and has the demand and sale of your Liver Pills been large and extensive and profitable?

87 Ans. The sales have been large and profitable. The pills are sold generally throughout the United States, and to a certain extent in other countries.

Int. 8. State briefly the history of C. McLane's Liver Pills; as to their inventor and of their manufacture by Fleming and the preceding firms, so far as the same is known to you, and produce and identify such papers and agreements as are in your possession showing said history.

Ans. I have the books and papers in my possession. Jonathan Kidd began the manufacture of McLane's Liver Pills in 1844. I have in my possession and now produce the original of an agreement between Charles McLane and Jonathan Kidd, dated June 19, 1844, Morgantown, V'a. It is hereto attached and marked "Exhibit K, J. H. B." It has been, to my knowledge, in the custody of Jonathan Kidd and Company and Fleming Brothers, and came into the possession of Fleming Brothers along with all the other papers of Jonathan Kidd and Company. The signature to Exhibit K, J. H. B., is in the handwriting of Jonathan Kidd. I am acquainted with his handwriting. I am familiar with the handwriting of D'r C. McLane. I believe that to be his signature to paper Exhibit K, J. H. B. In 1844 Jonathan Kidd was doing a general drug business in the city of Pittsburgh. McLane's Liver Pills at
88 that time had never been advertised or pushed. Their sale was limited. In 1845 Jonathan Kidd formed a copartnership with John Fleming, under the firm-name of Jonathan Kidd and Company. I now produce the articles of copartnership of that firm.

(It is hereto attached and marked "Exhibit L, J. H. B.")

I know the handwriting of Jonathan Kidd, John Fleming, and Lemuel Wilcox, j'r, parties, and one of the subscribing witnesses, to be the proper handwriting of those parties. I know that A. Ingram, j'r, the other witness, is dead. Directly after the organization of the copartnership of J. Kidd and Company, they began to advertise and push the sale of McLane's Liver Pills. In 1846 they began to sell them by commission

generally all over the country, and so they worked along doing a general drug business up to 1853, when Jonathan Kidd died, and was succeeded by Fleming Brothers, composed of John Fleming and myself. They purchased Jonathan Kidd's entire interest in the said business. Exhibit I, J. H. B., is the bill of sale from the executors of Jonathan Kidd to John and Cochrane Fleming. My brother John Fleming and myself continued the manufacture, under the firm-name of Fleming Brothers, of McLane's Liver Pills, until 1865, except that in 1854 Lemuel Wilcox became a member of our firm, the style of which was not changed. We three continued to do a general drug business,
89 advertising and pushing McLane's Liver Pills up to 1857, when Lemuel Wilcox retired.

I now produce the articles of copartnership between my brother, Lemuel Wilcox, and myself, and the article of sale of Lemuel Wilcox to John Fleming, when M'r Wilcox retired.

(The paper is hereto attached and marked "Exhibit M, J. H. B.")

The signatures to these papers of M'r Wilcox, my brother, and myself are the proper handwriting of the parties. In 1865 I withdrew from the firm without making any written transfer, leaving John Fleming sole proprietor of the business. In 1856 D'r McLane, Isaac Scott, E. P. Fitch, and George M. Hagens began the manufacture of what they termed McLane's Improved Liver Pills, at Morgantown, Virginia, D'r McLane having claimed a right to do so. Fleming Brothers again purchased from D'r McLane, Isaac Scott, E. P. Fitch, and George M. Hagens the exclusive right to manufacture and vend McLane's Liver Pills. I produce a bond or agreement dated January 8th, 1857, of D'r McLane, and the persons I have named. I am informed that this paper has been viewed by the subscribing witnesses before Commissioner Sturgis at Morgantown, West Virginia. The handwriting of D'r McLane I am acquainted with, and believe the signature to this paper to be his.

(This paper is hereto attached and marked "Exhibit N, J. H. B."
90 These papers have been in the custody of Fleming Brothers.

From 1865 John Fleming continued the business until 1870, when he died, leaving the business by will to myself. I have continued the business till the present time, and am still carrying it on. In 1857 our firm of Fleming Brothers sold their general drug business, and devoted themselves exclusively to the manufacture and sale of McLane's medicines. My brother's will appointed F. E. Porter, A. M. Byers, and myself, to whom letters testamentary were issued.

Int. 9. State whether the executors have proceeded to execute the provisions of said will by the payment of legacies, or securing them to be paid, and winding up the affairs of the estate.

Ans. They have, as far as possible, without sacrificing property, and to the satisfaction of all parties concerned.

Int. 10. State whether the estate of John Fleming was solvent, and whether or not the assets were largely in excess of the indebtedness of the estate.

Ans. The estate was perfectly solvent and the assets largely in excess of the liabilities, but not available immediately, although the debts were immediately paid out of available assets, and the estate is not now indebted.

Int. 11. State whether the firm of J. Kidd & Company and Fleming Brothers at any time received letters from James H. McLean,
91 of S't Louis, the defendant; and can you produce them?

Ans. They did, and I here produce them.

(One is dated March 11, 1852, and is hereto attached, marked "Exhibit O, J. H. B." One is dated Sep. 20, 1852, and is hereto attached and marked "Exhibit P, J. H. B." One is dated October 27th, I believe to be 1853, and is hereto attached, marked "Exhibit Q, J. H. B.")

This letter "Q" enclosed another which I here produce, Sept. 22, 1853, addressed to J. H. McLean, and by him sent as an enclosure in his of October 27th.

(This is hereto attached and marked "Exhibit R, J. H. B.")

I believe the letters "O," "P," and "Q" *I believe* to be in the handwriting of J. H. McLean. The endorsement "J. H. McLean, Oct. 27, 1853," is in the handwriting of John Fleming. The endorsement on "O" is likewise John Fleming's writing. The endorsement on "P" is my handwriting. These letters have been on file in the letters of Kidd and Company, and Fleming Brothers, and are taken by me from the letter-files of those firms.

Int. 12. State whether the firm of Fleming Brothers, or of J. Kidd and Company, at any time authorized the defendant to make and sell Liver Pills in imitation of C. McLane's Pills, as manufactured and sold by them.

Ans. They never did.

92 Int. 13. State what were the reasons for the change made by Fleming Brothers in 1855 from the red to the black label.

Ans. To counteract, if possible, the operations of J. H. McLean, who was then imitating our red label. Another reason was, that the firm had changed, and we wanted to put upon the label the name of Fleming Brothers.

Int. 14. State whether your firm has and does take in the compounding of these pills and in the selection of sound ingredients.

Ans. We take every precaution to secure good ingredients, and they are carefully compounded.

Int. 15. State whether the demand for these pills has proved to be continuous in the same sections of country.

Ans. It has. The demand has been a constantly increasing one—some years more, some years less—since the first introduction of them by Jonathan Kidd and Company.

Int. 16. State whether or not the firm of Fleming Brothers has expended, and continues to expend, large sums in the advertising of these McLane's Pills.

Ans. We have expended largely in advertising in newspapers and otherwise.

93 Int. 17. When pills have been introduced into sections of the country by advertising, does the suspension of the advertising affect materially the demand of the pills?

Ans. It does not. Wherever we have introduced the pills by advertisement, we hold the market.

Int. 18. When and where were C. McLane's Liver Pills first introduced?

Ans. To the best of my knowledge and belief, D'r C. McLane, who was then practicing medicine in Morgantown, Virginia, first introduced these pills in his practice.

Int. 19. What was the consideration of your sale of your interest to John Fleming in July, 1865?

Ans. I do not remember exactly; between thirty and forty thousand dollars.

Exhibit G, J. H. B., attached to deposition, is as follows:

Be it known that I, John Fleming, of the city of Pittsburgh and State of Pennsylvania, do hereby make and publish this my last will and testament, in manner following, so wit: I constitute and appoint Cochran Fleming, Frank E. Porter, and Alexander Byers executors of this my last will and testament, and I hereby empower my said executors, the survivors or survivor of them, to sell and dispose of any and all real estate, stocks, and personal property, not hereinafter specifically devised or bequeathed, that I may die possessed of, and to apply the pro-
94 ceeds thereof to the payment of the legacies and bequests hereinafter made and contained.

After the payment of my just debts, I direct that my executors shall invest in the name of my wife, Fredericka Fleming, and for her absolute use and disposal, out of the first moneys that come into their hands, the sum of fifty thousand dollars, the same to be in lieu of dower at common law, and of her interests under the intestate acts of this commonwealth; and I further direct that in making said investment that no sum greater than ten thousand dollars shall be invested in any one class of securities. I also give and bequeath unto my said wife my warehouse marked as number twenty-four, Wood street, Pittsburgh, to have and to hold for the term of her natural life, and at her death I give and bequeath the same unto my brother Cochran Fleming, to have and to hold for the term of his natural life, and at and immediately after his decease, I give and devise the said warehouse and lot unto the children of my said brother Cochran, in fee, share and share alike.

I also give and bequeath unto my said wife all my books, plate, household furniture, clothing, and utensils, beds and bedding, and effects of a similar personal character.

I give and bequeath unto my mother, for the term of her natural life, the use and income of ten thousand dollars, and her decease, I
95 give and bequeath the said use and income of the said ten thousand dollars unto my brother James Pressley Fleming; the investment of said moneys to be made by said executors; and at the decease of my said brother, I direct that the said sum shall go absolutely to his children, and that if he die leaving no children or their issue, the same shall go to his heirs at law.

To my sister Mary, I give and bequeath the use and income, for the term of her life, of the sum of five thousand dollars, the investment to be made by my executors, and I direct that at the death of my said sister Mary, the said sum shall be held and invested for the use and behoof of my sister, M'r's Martha Byers, for life, and that at her death the same shall go absolutely to her children.

To my sister, M'r's Martha Byers, I give and bequeath the use and income, for life, of the sum of five thousand dollars, the same to be invested by my executors, and at her death I direct the said sum shall be held and invested for the use for life of my brother Cochran, at his death the same to go to his children, share and share alike.

To my brother, James Pressley Fleming, I give and bequeath the use and income, for the term of his life, of the sum of ten thousand dollars, the same to be invested by said executors, and the proceeds paid
96 over by them to my said brother, and at his death, I direct that the same shall go absolutely to his children, share and share alike, and that in default of such children, or their issue, the same shall go for life to my sister, M'r's Eliza Wilcon, and at her death the same shall go absolutely, share and share alike, to her children.

To my niece, M'r's Annie Semple, I give and bequeath the use and income, for life, of the sum of ten thousand dollars, the same to be invested

by my said executors, and at her death, I direct and will that the said sum shall go absolutely to her children, share and share alike, and that should she leave no children, or their issue, I will and direct that the said sum shall go for life, as invested by said executors, unto her brother Lemuel North Wilcon, and at his death that the same shall go to his children, share and share alike, and in case he die leaving no children or their issue, I will that the said sum shall descend to his heirs at law.

I give and bequeath unto my said nephew, Lemuel North Wilcon, the sum of five thousand dollars absolutely; I give and bequeath unto John Fleming Arthur, of Baltimore, the sum of five thousand dollars absolutely.

To my brother Cochran I give and bequeath the good will and proprietorship of McLane's and other medicines, which I own and
97 control, on the following conditions, to wit, that immediately on my death he take charge of and carry on my said business, and if it is found on examination of my affairs that my available assets (in which are not to be included the warehouse and articles of a personal character hereinbefore bequeathed to my wife) are not sufficient to provide means wherewith to pay the foregoing pecuniary legacies in the order in which they are enumerated in this my last will, then that he carry on said business for the benefit of my estate, until enough of moneys are realized by said business to make good any deficiency in the moneys applicable to the payment of said legacies. On the payment of said legacies my other executors will execute and deliver unto my said brother Cochran all bill of sale or conveyance of my said business and property connected therewith, which may be desired by the said Cochran.

All the rest and residue of my estate, after the payment of the foregoing legacies, and excepting the foregoing specific devises and bequests, I give unto my said brother Cochran, absolutely.

Immediately at my decease the interest of fifteen per cent. in the net profits of my business, which I now allow F. E. Porter shall cease, and a settlement between him and my estate shall be made.

98 It is my will that my brother Cochran do not part with my business in the manufacture and sale of patent medicines, but keep the same up by a proper system of advertisment, and transmit it to his children.

My private books will disclose certain outside investments, in some of which F. E. Porter is jointly interested with myself, and I have so marked them in my said books, so that those of said investments that are exclusively my own can be distinguished from those in which the said F. E. Porter has an interest; on the final settlement of the books of Fleming Brothers, in which name my regular books of account are kept, the amount of said outside investments belonging to me alone will be charged against me, and any profits in said investments will be credited to me; and the amount of said outside investments in which said F. E. Porter and myself are jointly interested shall be charged against us in the respective indicated by said private books, and all proceeds of said investments credited in like manner.

In testimony whereof I have hereto set my hand and seal this twenty-first day of December, A. D. 1866.

JOHN FLEMING. [SEAL.]

Signed, sealed, published, and declared by the said John
99 Fleming, as and for his last will & testament in the presence of

us, who have at his request and in his presence, and in the presence of each other, *have* signed our names as witnesses thereto.

GEORGE CALHOUN.
W'M PFAHL.

STATE OF PENNSYLVANIA.
Allegehny County, ss:

Be it known that on the ninth day of November, A. D. 1870, before me, Joseph H. Gray, register of wills, &c., in and for the county aforesaid, came George Calhoun and W'm Pfahl, the subscribing witnesses to the foregoing last will and testament of John Fleming, dec'd, and on their solemn oath did say they were present, and did see and hear John Fleming, the testator therein named, sign, seal, publish and declare the same as and for his last will and testament, and at the time of so doing he was of sound mind and memory and understanding, to the best of their knowledge and belief; and at his request, and in his presence, they subscribed their names thereto as witnesses.

Given under my hand this ninth day of November, A. D. 1870.

JOSEPH H. GRAY, *Register.*

Now, November ninth, A. D. 1870, the testimony of the above-
100 named witnesses being sufficient, I do therefore admit the foregoing will to probate, and order the same to be recorded as such.

Given under my hand and the above date.

JOSEPH H. GRAY, *Register.*

STATE OF PENNSYLVANIA,
Allegheny County, ss:

I, Joseph H. Gray, register of wills, &c., in and for the county aforesaid, do hereby certify that the foregoing is a true and correct copy of the last will and testament of John Fleming, deceased, together with the probate, as recorded in will book, vol. 14, page 406.

Given under my hand and seal of office, this 26th day of November, A. D. 1872.

[L. S.] JOS. H. GRAY, *Register.*

COMMONWEALTH OF PENNSYLVANIA,
Allegheny County, ss:

I, Joseph H. Gray, register for the probate of wills, granting letters of administration, &c., in and for the county aforesaid, do hereby that on the ninth day of November, A. D. 1872, letters testamentary on the estate of John Fleming, deceased, late of the city of Pittsburgh, county aforesaid, were duly granted unto Cochran Fleming, F. E. Porter, & Alex. Byers, who were duly qualified, well and truly to administer the goods and chattels, rights and credits which were of said decedent.

Therefore all faith and credit are of right due, and ought
101 to be paid to all their lawful acts as such throughout the United States and elsewhere.

Given under my hand and seal of office, at Pittsburgh, this 25th day of November, A. D. 1872.

[SEAL.] JOSEPH H. GRAY, *Register.*

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

I, James P. Sterrett, judge of the court of common pleas in and for

the county aforesaid, do hereby certify that Joseph H. Gray, whose certificate is above written, is the register for the probate of wills, granting letters of administration, &c., in and for the said county, duly commissioned and sworn, to all whose official acts full faith and credit are due, and that his certificate is in due form of law, and that the seal affixed to said certificate is the seal of said register.

Witness my hand and seal, at Pittsburgh, this 25th day of November, A. D. 1872.

JAMES P. STERRETT, [SEAL.]
President Judge of the Court of Common Pleas.

COMMONWEALTH OF PENNSYLVANIA,
Allegheny County, ss:

I, Joseph Ross, prothonotary of the court of common pleas in and for the county of Allegheny, do hereby certify that the Hon.
102 James P. Sterrett, whose certificate is above written, and in his own proper hand subscribed, is, and was at the time of so doing, acting president judge of the said court of common pleas in and for the said county of Allegheny, duly commissioned and sworn, to all whose official acts full faith and credit are due.

Witness my hand and seal of said court, at Pittsburgh, this 25th day of Nov., A. D. 1872.

[SEAL.] JOSEPH ROSS.
Prothonotary.

Exhibit K attached to deposition of Lemuel Wilcox, being the same, is not here inserted.

Exhibit I to which reference is made, is as follows:

Know all men by these presents that we, James Benney, Lemuel Wilcox, jr., and Nancy Kidd, executors of the last will & testament of Jonathan Kidd, late of the city of Allegheny, deceased, for the consideration of the sum of thirty-four thousand dollars, the payment of which has been secured to our satisfaction by John Fleming & Cochran Fleming, of the city of Pittsburgh, have granted, bargained, sold, assigned, transferred, and set over to the said John Fleming and Cochran Fleming, their executors, administrators, and assigns, all the right, title, interest, and claim belonging to the estate of said Jonathan Kidd, deceased, of, in, or to the goods, chattels, bonds, notes, accounts,
103 claims, rights, and credits of every description, belonging or in any manner appertaining to the late firm or copartnership of J. Kidd & Co. (which firm was composed of the said Jonathan Kidd & John Fleming), in the drug business in the city of Pittsburgh, with full power and authority to said John & Cochran Fleming, and those claiming under them, to have and enjoy forever all the right, title, interest, and claim aforesaid of, in, and to said goods, chattels, bonds, notes, accounts and claims, rights and credits, they the said John & Cochran Fleming paying and satisfying all the debts, claims, and demands against said late firm or copartnership of J. Kidd & Co.

In testimony whereof we have hereto set our hands and seals this thirtieth day of April, eighteen hundred and fifty-three.

JAMES BENNEY. [SEAL.]
L. WILCOX, JR. [SEAL.]
NANCY B. KIDD. [SEAL.]

Attest as to James Benney & L. Wilcox, jr—
A. N. LOOMIS.

Exhibit M having been withdrawn from this deposition by leave of court, to be used in other depositions, the same will hereafter appear.

Exhibit N is heretofore inserted as—

Exhibit O, referred to, is as follows, to wit:

S'T LOUIS, *March* 11*th*, '52.

Mess'rs KIDD & Co.:

104 GENTS: I have been induced by various reasons to address you. I am now engaged manufacturing a liniment called McLean's Vol'anic Oil Liniment, and since I have commenced advertising it, I have received for my liniment and some of your pills, vermifuge, they having thought I was the inventor of your pills and vermifuge. I have also before me a letter that was sent from or near Allegheny City, opposite your city, ordering two dozen of my liniment; they state that they have been to Pittsburgh and enquired at your house for it, and you told him that you did not know anything about it.

I have referred my pill and vermifuge orders to our wholesale druggists, because I do not keep any med's on hand except my liniment. I believe you will have more orders for my liniment, and I should like to make you the wholesale agent at Pittsburgh, if you will take hold of it, and interest yourself with it, because I know you can in a great many instances sell by recommendation, and I will return the compliment. I will avail myself of every opportunity to push your interest, and I expect I shall have chances enough to do so, because I intend starting some agents to go into the country, and anything that will fecilitate the sale of your medicines shall be done.

JAMES H. McLEAN.

S'T LOUIS, *March* 1, '52.

105 I have another proposition to mak'. I would like if you would wrap around each bottle of your vermifuge a small slip of paper as large as half a page of your almanack, naming my liniment, where it can be got, &c. I will do the same with you. I will wrap your advertisement around each bottle of liniment. I think that this would be for our mutual interest, because our medicines does not conflict in any way. I believe it would be an advantage to you, because I intend to send my liniment all through the Southern country, where I know your medicines have not yet been introduced.

I have only started it about 5 months, and it sells far beyond my expectations. I could send you any amount of certificates, some almost beyond belief, but they are endorsed by our best citizens, and cannot be contradicted. One I got to-day, an old lady sixty-five years of age. She was all drawn up with or by rheumatism. She has not used her feet for eleven years, and now she can walk as straight as I can. She is called Brooks. My liniment sells for the same as your vermifuge, viz, 25 c'ts per bottle, $1.50 per doz., $15 per gross, eight gross for $100.00. These are my established prices, and always instruct my agents to keep these prices firm. I called to see you last summer, and left you my
106 card. For references, D'r Kayser, the firm of Kayser & McDowell, also S. M. Kier, are acquainted with me. I am acquainted with several persons more with whom I have done business with, but nothing more.

I would call your immediate attention to these statements. I think it is of importance to both parties. Should you accept of these things,

I will not prepare anything that will conflict with your medicines, and I, as a matter of course, should require you to do the same.

Await your answer.

Yours, respectfully,

JAMES H. McLEAN.

Enclosed is a few certificates; examine them.

Exhibit P, referred to, is as follows, to wit:

S'T LOUIS, *Sept.* 20, '52.

Mess'rs KIDD & CO.:

GENTS: My agents, in travelling through the country with my liniment, have a great many calls for my vermifuge, and sometimes pills, thinking, at the same time, that I am the McLane from Pittsburgh. I have sent out several gross of your vermifuge to supply those demands, which I have exchanged for with our merchants. I know I could sell my own vermifuge or pills invariably, but I have my hands full with my liniment, and do not wish to put up anything else. I would
107 like to know what you would let me have your vermifuge for, and pills; how and on what terms. I can sell a tremendous quantity of them, as I have now six teams running in the country, selling and introducing my liniment, and if I could make an exchange, or in some way so that I can make a profit, and also my agents, let me know by return mail what is your proposition, &c.

I remain yours, &c.,

JAMES H. McLEAN.

Exhibit Q, referred to, is as follows, to wit:

S'T LOUIS, *Oct. 27th.*

Mess'rs FLEMING BROTHERS & CO.,
Pittsburg, Pa:

GENTS: I was desirous of seeing M'r Fleming while in this city last spring, in order to make some arrangements to get your pills and vermifuge, so that I could send them out with my travelling agents, and dispose of them at your prices. My men informs me on their return from the country that they could sell a large quantity, because the merchants think that they are of my manufacture also (not the wholesale merchants). I have eleven teams travelling with my liniment, two in each of the Western States, three in Indiana, besides my own orders.

Enclosed is one which I received last week, a small one, such as I
108 receive daily. Yesterday R. B. Suon was in my store when a merchant called for my vermifuge. He suggested to me the propriety of making mutual arrangements, as he stated he had similar calls, and, of course, could not sell my pills or vermifuge, although their order stated so, when he knew that they wanted your medicines.

I have also been advised to put up pills, &c., but do not wish to do so. It would interfere with yours; and, of course, you could with the same propriety put up my or McLane's lin't. Such a collision I would not like, and for that reason wish to get your pills and vermifuge, so as I can wholesale them in the country at your prices.

I know that my liniment does not sell very fast in your city, but would like to have you take hold of my liniment, and what you sold give me exchange. I will take 100 gross of your medicines—25 gross of pills and 75 gross of vermifuge—at your usual time, twelve months; but I

would like to get them, when I take that amount, less than ten dollars per gross, your terms, as you stated to me last winter. But if you cannot possibly let me have them less, send me ten gross, to keep me supplied until freight is somewhat less, then send the remainder. Remmember, my sales are better than any wholesale dealer, because they
109 go into the places where your medicines are not known—Arkansas, Texas, Alabama, Georgia, &c. For references, R. B. Snow & Co., Charless, Blow & Co., Francis Walton Warren, or any wholesale druggist, and E. W. Clark & Bro., bankers.

Yours, &c.,

J. H. McLEAN.

Exhibit R, referred, to is as follows, to wit:

OLD ALEXANDRIA, MO., *Sept. 22nd*, 1853.

Mr. J. H. McLEAN:

D'R SIR: Unexpectedly I send this morning by the bearer, M'r McCullam, to you for 2 doz. pills & 1 doz. vermifuge. I will be in S't Louis in about ten days & will pay you for the same. I have a calls every day for the & what I got only gave them a reputation here. When I come down I want several articles in your line.

Yours, respectfully,

W. A. SALLEE.

A. H. Clark—Deposition of.

My name is A. H. Clark. I am forty seven years of age. My residence is in New Brighton, Beaver County, State of Pennsylvania, and I am an attorney-at-law, and one of the attorneys for the complainant in this case. I came to Cumberland, Allegany County, State of Maryland,
for the purpose of obtaining the testimony of A. H. Loomis, esq.,
110 whose name appears as one of the attesting witnesses to one of the papers in this case.

I proceeded in company with Ja's Forsyth Harrison, a special commissioner, to the Central Hotel, situated on Baltimore street, in the city of Cumberland, county of Allegany, and State of Maryland, where I found the said A. W. Loomis, unconscious and in a dying condition, surrounded by his relatives and friends, suffering from the effects of a paraletic stroke. I saw him lying upon a bed, in said Loomis' room, in said Central Hotel, as aforesaid. His attending physician was not present at the time I saw him, but that I observed his breathing was exceedingly laborious and difficult, and was utterly unconscious of all of his (said Loomis') surroundings.

Solomon Shoyer, j'r—Deposition of.

Interrogatory 1. State your name, age, residence, and occupation.

Answer. My name is Solomon Shoyer, j'r. I am forty years of age. I live in the county of Allegheny, and State of Pennsylvania. My profession is an attorney-at-law, of the Pittsburgh bar.

Int. 2. Do you know the handwriting of A. W. Loomis, esq., formerly a distingnished member of the bar of Pittsburgh?

Ans. I do.

111 Int. 3. Look at the signature attached to the attesting clause of Exhibit I, J. H. B., and state whether you know that to be the handwriting of A. W. Loomis.

Ans. It is the handwriting of M'r Loomis. I think the body of the instrument is in the handwriting of John F. McKenzie, once a clerk of M'r Loomis.

Marcus A. Woodward—Deposition of.

Interrogatory 1. State your name, age, residence, and occupation.

Answer. My name is Marcus A. Woodward. I am thirty six years of age. I live in Pittsburgh, Allegheny County, Pennsylvania. My profession is attorney-at-law.

Int. 2. Are you acquainted with the handwriting of A. W. Loomis, esq., formerly an attorney of standing in this city?

Ans. Yes, sir.

Int. 3. Did you read law in his office?

Ans. I read law in his office, and was afterwards in partnership with him.

Int. 4. Look at paper marked Exhibit I, J. H. B., and state whether the name written in attestation of that paper is the handwriting of A. W. Loomis, esq.

Ans. It is.

Int. 5. State where M'r Loomis now is, and what his condition of health is.

112 Ans. He is now living in Cumberland, State of Maryland, and is in feeble health.

Int. 6. Do you know in whose handwriting is the body of the instrument itself?

Ans. I only know it is in the handwriting of a former clerk of M'r Loomis. I would not say now it is in the handwriting of which one. I am familiar with the handwriting.

Charles A. R. Benney—Deposition of.

Interrogatory 1. State your name, age, residence, & occupation.

Answer. My name is Charles A. R. Benney. I am thirty-nine years of age. I live in the city of Pittsburgh, county of Allegheny. I am in the pork business.

Int. 2. Do you know the handwriting of James Benney and of Nancy B. Kidd, and were they relatives of yourself?

Ans. I know their handwriting. I am the son of James Benney, and M'r's Kidd is my sister.

Int. 3. Look at the signatures to the paper Exhibit I, J. H. B., and state in whose handwriting they are.

Ans. The first is my father's. The third is that of Nancy B. Kidd. I believe the second to be that of Lemuel Wilcox, j'r.

Int. 4. Is James Benney living?

Ans. My father died a few years ago. M'r's Kidd is still living.

113 *William J. Bender—Deposition of.*

Interrogatory 1. State your, age, residence, and occupation.

Answer. My name is William J. Bender. I am forty-five years of age. I live in the city of Pittsburgh, in the county of Allegheny, and State of Pennsylvania. I am a book-keeper for Reymer and Brothers.

Int. 2. Look at Exhibit M, J. H. B., and state whether you are the attesting witness to the paper on the first leaf.

Ans. I am, sir; that is my signature.

Int. 3. Do you know the handwriting of the parties to the paper?

Ans. I recognize the handwriting of the three parties to this paper. I was with them ten years as bookkeeper, and am perfectly familiar with their handwriting.

Benjamin M. Dorsey—Deposition of.

Ques. Please state your name, age, occupation, and residence.

Ans. My name is Benjamin M. Dorsey; age, 48 years; occupation, farming and grazing; residence, Morgantown, Monongalia County, West Virginia.

(A. H. Clark, att'y for complainant, here produced a paper marked "Exhibit N, J. H. B.," and "Exhibit N, A. G. S.," attached hereto, and made a part of these depositions, and requests the witness to
114 state what he knows with regard to the signatures of said exhibit.)

Witness states: It is my genuine signature, and in my own handwriting as one of the attesting witnesses thereto, and the signature of W. T. Willey, the other attesting witness, is in his own proper handwriting. I am familiar with the signatures of Charles McLane, Isaac Scott, E. P. Fitch, and Geo. M. Hagans, and their signatures to said Exhibit N, J. H. B., and Exhibit N, A. G. S., are in their own proper handwriting, and were signed or acknowledged by them in my presence as one of the attesting witnesses. I am also familiar with the handwriting in the body of the instrument, and recognize it as being in the handwriting of Waitman T. Willey, the other attesting witness thereto.

W. T. Willey—Deposition of.

Ques. Please state your name, age, occupation, and residence.

Ans. My name, Waitman T. Willey; age is sixty-one years; am an attorney at law; reside near Morgantown, Monongalia County, West Virginia.

(A. H. Clark, complainant's attorney, here produced a paper marked "Exhibit N, J. H. B.," and "Exhibit N, A. G. S.," attached hereto, and made a part of these depositions, and requests witness to state what he knows with regard to the signatures of said exhibit.)

115 Witness states: It is my genuine signature, and in my own handwriting as one of the attesting witnesses thereto. The instrument is drawn up in my own handwriting and by myself. I am also familiar with the signatures of Charles McLane, Isaac Scott, E. P. Fitch, and Geo. M. Hagans, and the signatures of said McLane, Scott, Fitch, & Hagans attached to said instrument or exhibit are genuine, and in their own handwriting, and were executed or acknowledged before me as one of the attesting witnesses thereto; but I am not acquainted with the signature of the other attesting witness, Benjamin M. Dorsey.

(Exhibit N offered. Appears heretofore as Exhibit D to bill of complaint.)

E. S. Morrow—Deposition of.

Interrogatory 1. State your name, age, and place of residence, and your occupation.

Answer. My name is E. S. Morrow. Am thirty-four years of age. I reside in Pittsburgh, Pa., and am clerk.

(A. H. Clark, complainant's attorney, here produces paper marked "Exhibit M, J. H. B.," and "S. C. Shoyer," attached thereto, and made part of this deposition, and asked the witness to state what he knows with regard to the signature thereto.)

Answer. The signature of R. Morrow, attesting witness, on the
116 third page, and before whom the acknowledgement was taken, is the signature of my father, who at that time was an alderman, and has since died. The writing on the third page, with the exception of the signature of L. Wilcox, j'r, is my father's handwriting.

Frank E. Porter—Deposition of.

Interrogatory 1. State your name, age, residence, and occupation.

Answer. My name is F. E. Porter. My age is fifty-two years. I live in Rochester, Beaver County, State of Pennsylvania. My business has been for twenty-five years introducing and selling McLane's medicines.

Int. 2. State whether at any time, and, if so, when, you had any partnership, connection, or interest in the firm of Fleming Brothers.

Ans. About 1862, I think. I was to receive an interest in the net gains of Fleming Brothers as a compensation. That interest ceased at the death of John Fleming.

Int. 3. Are you named as an executor of John Fleming's will?

Ans. Yes, sir.

Int. 4. State whether the manufacture and sale of Liver Pills by the firm of Fleming Brothers, while you acted for the firm, was large and extensive, and state in what region of country the sales were made.

117 Ans. The sales were large and extensive. They were sold largely in the United States, and to some extent in the British Provinces in North America, and some in Mexico. These I know of my own knowledge.

Int. 5. State when and by whom these McLane's Liver Pills were first made and put upon the market, if you know.

Ans. The first knowledge I had of them was a few years, two or three probably, before the 1st of April, 1846, at which latter date I began travelling for Jonathan Kidd and Company, of Pittsburgh. I first knew these pills when I was selling drugs in Bridgewater, Beaver County, Pennsylvania.

Int. 6. State who constituted the firm, if you know, of Jonathan Kidd and Company when you went into their employ.

Ans. Jonathan Kidd and John Fleming.

Int. 7. About how long did the firm of Jonathan Kidd and Company, as so constituted, carry on the manufacture and sale of McLane's Liver Pills?

Ans. Up to the death of Jonathan Kidd, the date of which I cannot give.

Int. 8. What was the name and style of the firm that succeeded Jonathan Kidd and Company in the manufacture and sale of these pills?

Ans. Fleming Brothers, composed of John Fleming and Cochran Fleming.

118 Int. 9. What, if you know, was the next change of the members of the firm, and about when?

Ans. Lemuel Wilcox came in and went out during the continuance of the firm of Fleming Brothers, but the dates when he came in and went out I can't state. Cochran Fleming went out of the firm subsequently to the withdrawal of Lemuel Wilcox, leaving John to carry on the business.

Int. 10. State whether during all these changes, after the first formation of the firm of Fleming Brothers, the manufacture and sale of the McLane Liver Pills was continued, and what the name and style of the firm.

Ans. The manufacture and sale was continued, and the name and style of the firm is continued up till the present—that is, Fleming Brothers.

Int. 11. Who has carried on the firm of Fleming Brothers since the death of John?

Ans. Cochran Fleming.

Int. 12. State whether you are familiar with the labels and trade-marks used by the firm of Fleming Brothers from the time of your first acquaintance with it to the present time; and, if so, give a brief description of those labels and trade-marks as they have been used by said firm.

Ans. The first recollection I have is of a red label, such as Ex-
119 hibit E. That is my first positive recollection. I remember this twenty years or more ago, as a label then used by Jonathan Kidd and Company. This continued to be used up till about 1855, when the label was changed from red to black, like that on Exhibit A. That like Exhibit Q was continued till 1870 or 1871, when another was adopted. This, which I now produce, marked "Exhibit H, J. H. B.," was substituted for Exhibit A in 1870 or 1871. When Exhibit H was adopted the name of Jon. Kidd and Co. was left off, and number of the house on the street was changed, but no other changes were intended to be made. It was made as near like the older one as we could get the engraver to make it.

Int. 13. State how these pills were put up?

Ans. They are put up in oval wooden boxes, with a red seal on the lid, with "McLane's Liver Pill" stamped thereon. There are twenty-two pills in the box. That was enclosed in a paper wrapper, containing directions, of four pages, the pages respectively being printed in English, German, French, and Spanish. That was enclosed in a label of the forms already spoken of. One dozen of these were placed in a pasteboard box, and twelve dozen of these pasteboard boxes were placed in a wooden box.

120 Int. 14. State what was the habit of the firm as to making sales, whether in the principal cities to large dealers, and to smaller dealers through the country?

Ans. I commenced by commissioning them in a great number of States to small dealers, and that was the usual mode of their doing it. After a good demand had been established, they discontinued that mode, and sold to large dealers in the principal cities, who furnished the smaller dealers with their supplies.

Int. 15. State whether the demand for these pills has been continuous in the same sections of country, and whether, so far as you know, they have given satisfaction to those using them.

Ans. The demand has been continuous in the same sections, and they give very general satisfaction, so far as I know.

Int. 16. State whether you know of the continued use of these pills in families, showing that they have given satisfaction.

Ans. I know of numerous instances, and can mention that they have been continuously and frequently used in my father's family, and have given satisfaction.

Int. 17. State, if you know, whether skill and care are used in

121 the manufacture of these pills, and whether precautions are taken to secure purity of ingredients?

Ans. I think that they take every precaution they can to secure purity of ingredients, and that they use the care, and, I believe, skill, in compounding them. I know that the firm has employed at different times, M'r Otto Ureth, an analytical chemist of reputation, to analize the ingredients they proposed to use in their pills, so as to secure purity.

Int. 18. State when in the trade you first encountered the pill put up by J. H. McLean, of S't Louis.

Ans. It was since the introduction of D'r C. McLane's pills—several years thereafter.

Int. 19. Have you seen the pill as put up by McLean of S't Louis?

Ans. Yes, sir.

Int. 20. State whether, as a dealer, you would consider the pill as put up by McLean, of S't Louis, resembles the label and devices of plaintiff, so as to be likely to deceive or mislead those who purchase the pills.

Ans. I think they do. I know they do.

Int. 21. Have you had frequent conversations with dealers in these liver pills, in different parts of the country, and can you state the opinion entertained by such dealers, as to whether the pill manufactured by McLean, of S't Louis, is so offerred as to resemble the plaintiff's

122 article, and is calculated to deceive purchasers?

Ans. I have had frequent conversations with dealers, and I think that all I have had conversations with stated that they believed that they were gotten up in imitation of McLane's pills. I do not now recollect an exception.

Int. 22. State, if you know, whether or not, in the advertisements of Jonathan Kidd and Company and Fleming Brothers, special attention was called to the seal of red wax on the boxes, as a distinctive feature of their manufacture.

Ans. It was, and is; and such warning appears on all the labels.

Int. 23. State at what price these pills have been usually sold, and still are sold.

Ans. Previous to the war, in large lots, at ten dollars a gross. The price has advanced from time to time. They are now selling at sixteen dollars and fifty cents a gross.

Int. 24. Look at Exhibits O, P, and Q, and state whether you know in whose custody those letters have been, and from what files they have been produced.

Ans. I found these letters in the regular letter-file of the firm of Fleming Brothers, and I saw them taken from the files and produced here.

Int. 25. State whether the property in C. McLane's Liver Pills,

223 as the same has been created and maintained by the firm of Jonathan Kidd and Company and Fleming Brothers, is valuable or otherwise.

Ans. It is very valuable.

Int. 26. State whether or not you know that Fleming Brothers have expended large sums in advertising and pushing the market for these pills.

Ans. I know that they have.

George T. Jones—Deposition of.

My name is George T. Jones. I reside in Washington City, D. C. My business is that of a bank-note engraver. I have seen the label marked "Exhibit A" attached to the deposition of Cochran Fleming.

That label I engraved for J. Kidd & Co., in 1847. John Fleming was the company with J. Kidd. I made the arrangement with them finally here in Pittsburgh. In a conversation with M'r Kidd and M'r Fleming, in their store, No. 60 Wood street, M'r Kidd remarked, showing me the label they were then using, that he was now satisfied that they were going to make a good business out of the McLane's Liver Pills, and that he desired to get an engraved label, he said, to prevent counterfeits and imitations. The label they were then using, and had been using for some years, was an ordinary printed label in red ink. Subsequent to that conversation, we engraved a steel-plate for the label, marked "Exhibit A," and attached hereto.

124 This conversation was in the spring of 1847. During this conversation M'r Kidd remarked that the reason they wanted to secure this label was that they had already invested $40,000 in building up the trade of McLane's Liver Pills. We commenced printing these labels in 1847, and continued printing this red label until 1855. During this time I was connected with the house of Rawdon, Wright, Hatch & Edson, bank-note engravers, of New York. I was manager of the branch house at Cincinnati, and it was at Cincinnati this work was done. In 1855, M'r Jno. Fleming came to my office at Cincinnati, and he showed me a label for liver pills, similar in form and color to the one I had engraved, and stated that certain parties in S't Louis were imitating the label. The one he exhibited was an imitation of his, and said, in order to head them off, they had determined to have a new label engraved, and printed in black instead of red. We engraved new dies, and made steel-plate, and commenced printing from that time on in black. The second label, the one in black, was engraved for Fleming Bro's, successors to J. Kidd & Co. At the same time of engraving this second label, we engraved a circular, in the center of which was this new pill label, and new vermifuge labels. This circular was, as it read, to caution the public against counterfeits and imitations,

125 and show them at the same time the true labels. As to the number of labels used by them, I can say that we had a standing order to make a thousand impressions per week, and upon the plate were thirteen labels. We filled those orders and sometimes more.

I have seen McLane's Liver Pills in these labels throughout the North and Southwest and Mississippi Valley in drug-stores. I have seen them in considerable quantities, and I have known J. Kidd & Co., and their successors, Fleming Bro's, as the sole proprietors of McLane's Liver Pills, during the time I have printed these labels. I delivered the first labels in the summer or fall of 1847, and they were immediately used by J. Kidd & Co. The reason I noticed McLane's Liver Pills wherever I went was they were my own engraving, and I could always detect and notice it.

Cochran Fleming—Deposition of, Jan'y 8, 1873.

My name is Cochran Fleming. I am forty-six years old. I reside at Sewickly, Allegheny County, Pennsylvania, and I am a druggist, and complainant in this case. We adopted the label, copyrighted, August, 1847, for the better security of our trade, and continued its use up to about 1854 or 1855. (Label here produced by witness, and marked "Exhibit A," and attached hereto.) This label was used as the outside wrapper for McLane's Liver Pills. Previous to using this label

126 we used an ordinary printed label. I have no copy of the first label, and don't remember its appearance. We used this common

printed label from 1844 to 1847; by we, I mean the house of J. Kidd & Co. The boxes were the same shape then as now, and have as long as I can remember always had the red seal, which seal we considered a valuable part of our trade-mark. The boxes always contained the same number of pills, and made in the same way, and after the formula or prescription of D'r Cha's McLane, and are still so prepared. John Fleming is now dead, and all I have to say of the alleged intimacy between him and J. H. McLean, of S't Louis, is that I know John Fleming never had any confidence in J. H. McLean. When I went to S't Louis, many years ago, I had special instructions from John Fleming to avoid J. H. McLean as a dangerous, unscrupulous man. After receiving these instructions I visited S't Louis many, many times, and never called on J. H. McLean. Never knew of my own knowledge that my brother John ever did call himself on J. H. McLean; am very sure up to the day of his death he never changed his opinion of J. H. McLean's character.

F. E. Porter—Deposition of, August 27th, 1873.

Interrogatory 1. State your name, age, place of residence, and occupation.

127 Answer. My name is F. E. Porter. My age is fifty-two years, last November. I reside now at New Brighton, Beaver County, Penn'a; formerly resided at Rochester in said county. I am doing business for Fleming Bro's. About three years ago I called on M'r Helm, at Cincinnati, superintendent of the American Bank Note Company, with regard to making a new plate for wrappers for McLane's Liver Pills, Fleming Bro's having complained that the wrappers they had been using were not of uniform color. The longer the old plates were used the lighter the impressions became, as is shown by exhibit marked "A, S. C. Schoyer," attached hereto and made part hereof. The label marked "Exhibit B, S. C. Schoyer," is from the old plate before it became worn. M'r Helm said, by using lathe-work for the background of the label, he could make a label that would not change near so quickly. I asked him if it would change the appearance of the label. He said not materialy. I told him, under no circumstances could Fleming Bro's be induced to change their label from the general appearance of those they had been using. He said by this new work, lathe-work, he could keep the color uniform, and he could make the label substantially the same as

128 the old one. He had made one label a short time previous, which Fleming Bro's rejected, for the reason that it was not like the one in use by them. The only material change I would consent to for Fleming Bro's was substituting "24 Wood street" for "60 Wood street," and dispensing with "successors to J. Kidd & Co." The whole tenor of our conversation was, that the new label was to be as near like the old one as it could be made. This lathe-work was suggested by M'r Helm, as I knew nothing of such work.

A day or two previous to May 20th, 1872, M'r L. Gray, complainant's attorney, suggested that J. H. McLean, the defendant, be notified that this bill was about to be filed. Accordingly, on May the 20th, 1872, I called on McLean at his office in S't Louis, Mo. McLean then told me that M'r Gray had notified him of intended proceedings against him. I am positive as to the date from a memorandum I now have in my hand, and made by me shortly after leaving his office. In that interview I notified him that Fleming Bro's were about to commence proceedings against him for infringement of their trade-mark. M'r McLean then

told me that his lithographic stones had become worn, and he thought of making some change. He asked me what we wanted. I told him I had no suggestions to make—that Fleming Bro's were determined
129 to protect their trade-mark, and that he had infringed on their rights in making a label very near like that used by Fleming Bro's. He claimed he was not. He told me to call again, and he would have a copy of a label he proposed making.

On the 22d day of May, 1872, I called again. He said the drawing had gone a short time before (that day) to the lithographer's or engraver's. He asked me to call there and see it, which I did. The engraver or lithographer's name was McLean—Alexander was his first name, I think. I called, and they were at work on the stone. On the 28th of May, 1872, I called on J. H. McLean again. I told him the change he was making was not sufficient. He showed me a box of pills with a wrapper on exactly similar in appearance as this.

(Box of pills, with wrapper, produced by witness, marked "Exhibit C," annexed hereto, and made part hereof.)

After I told him that Fleming Bro's would proceed against him immediately, I wanted him to give me the box of pills and wrapper he showed me, which he refused, saying that it might be used against him. I told him the change he was making in his label would not satisfy Fleming Bro's, and they would go with the prosecution and protect their rights. I think the wrapper marked "Exhibit C" was the same as the drawing I saw at the engraver's or lithographer's.

130 *Lemuel Wilcox—Deposition taken at Chicago, Ill's.*

Int. 1. What is your name, age, residence, and occupation?

Ans. My name is Lemuel Wilcox; my age is 57 years; I resi[illegible] in Pittsburg, in the State of Pennsylvania, and was a druggist up to 1860; am now engaged in other business.

Int. 2. Are you acquainted with D'r C. McLane's Liver Pills and if yea, give a history of their origin and first appearance, so far as you can.

Ans. I am acquainted with D'r C. McLane's Liver Pills. I first knew them when put up by J. Kidd or J. Kidd & Co., with a red label on them, and the red label was changed to a black label some time between the years A. D. 1854 & A. D. 1857.

Int. 3. Please give a history of J. Kidd & Co. and Fleming Brothers, and your connection with them.

Ans. The firm of J. Kidd & Co. was formed in A. D. 1845, composed of Jonathan Kidd and John Fleming. M'r Kidd died the latter part of March, 1853, and his interest in the firm and business was sold by his executors, of whom I was one, to John & Cochran Fleming, who continued the business under the firm name of Fleming Brothers. I was admitted a partner in the firm in January, A. D. 1854, and continued as such until August, A. D. 1858. During my connection as above, I was well acquainted with the article known as McLane's Liver
131 Pills, and know that great pains and care were taken to have the best and purest materials only used, and the greatest care taken in putting the medicine up; that large sums were expended in advertising the article, both in newspapers, and show-cards, and pamphlets, and great exertions used to distribute them by traveling agents, and to establish a reputation for them. The sales by these means were quite large and remunerative in this and other countries.

Int. 4. Look at the paper-writing now shown you, marked "Exhibit B," which is hereto attached, and state what it is.

Ans. I have examined the paper writing now shown me, marked "Exhibit B." It is a true copy of the articles of copartnership between Jonathan Kidd and John Fleming, to which I was a witness, and also A. Ingram. M'r Ingram is dead.

Int. 5. Look at the paper writing now before you, marked "Exhibit C," which is hereto attached, and state what it is.

Ans. I have examined the paper writing now shown me. It is a true copy of the copartnership between John and Cochran Fleming & myself.

Int. 6. Look at the paper writing now shown you, which is hereto attached, marked "Exhibit D," and state what it is.

132 Ans. I have examined the paper writing now shown me, marked "Exhibit D." It is a true copy of a bill of sale from the executors of Jonathan Kidd, deceased, to John & Cochran Fleming, of Jonathan Kidd's interest in the firm of Jonathan Kidd & Co.

Int. 7. State whether or not this bill of sale conveys, among other things, a right to make and sell McLane's pills, and the use of the label and trade-mark thereon.

Ans. It does, or was so intended.

Int. 8. State at what time the change in the label was made.

Ans. It was made during my connection with the firm, but I do not recollect the exact year.

Int. 9. State how the medicine was regarded by dealers, and whether the sales were large or limited.

Ans. It enjoyed a high reputation. The sales were large and constantly increasing during my connection with the firm.

Int. 10. State whether or not, in the advertisements of the D'r C. McLane's pills, it is claimed that they are a cure-all, or unfailing remedy in all cases of disease.

Ans. They were not, but were simply set forth as a remedy for liver complaint, as set forth in the printed paper, which I hereby attach to this my deposition, marked "Exhibit E." This printed paper accompanies each box.

133 Int. 11. State how you regard these pills of D'r C. McLane.

Ans. As a valuable medicine for the purposes for which they are recommended.

(Exhibit E forms part of the bill herein.)

A. L. Melm—Deposition of, November 18, 1872.

Question 1st. Please state your name, age, occupation, and residence.

Answer. My name is A. L. Helm; my age, 37 years; occupation, engraver; res., Cin'ti, O.

Question 2d. Are you acquainted with the firm of Fleming Bro's of Pittsburg, Pa.?

Answer. I am.

Question 3d. Have you done the engraving of labels to be used upon boxes of pills for them; and, if so, for how long?

Answer. I was in the house of Rawden, Wright, Hatch & Edson, bank-note engravers, in 1850, where this work had been engraved.

Question 4th. Do you recognize Exhibit "A," and for whom and what company it was engraved?

Answer. For J. Kidd & Co., Pittsburgh, Pa.

Question 5th. Did you, or those by whom you were employed, supply them with those labels, marked "Exhibit A"?

Answer. By reference to the books, I know that they were delivered before 1850, and from personal knowledge since, up to 1855.

Question 6th. When did you commence making labels, marked "Exhibit B"?

134 Answer. The fall of 1854.

Question 7th. State what disposition was made of the labels, Exhibit B, when made.

Answer. They were forwarded to Fleming Bro's, Pittsburg, Pa.

Question 8th. Up to what time did you continue to print and deliver labels marked "Exhibit B"?

Answer. From 1855 to 1871 (Oct. 16th).

Question 9th. How long have been in the business as an engraver?

Answer. I have been an engraver in bank-note companies since July 29th, 1850, and I assisted in engraving plate of Exhibit B, and now as manager of the American Bank-Note Company, continue to furnish the labels for the McLane's pills to Fleming Bro's, Pittsburgh, Pa.

A. L. Helm—Deposition of, August 2d, 1873.

Question. What is your name, age, occupation, and place of residence?

Answer. My name is A. L. Helm; 39 years of age; occupation, engraver and sup't of the American Bank-Note Co.; place of business, No. 163 W. Fourth st., Cin., O.

Question. How long have you been in the business as engraver & sup't?

Ans. Twenty-three years as engraver, and as sup't 4 years, of the American Bank-Note Co., at Cin'ti, O.

Ques. State whether you have done work for the complainants in this case.

135 Ans. Well, in the first place, the original plates were engraved by the house of Rawden, Wright, Hatch & Edson, predecessors of the American Bank-Note Co., and work continued by the American Bank-Note Co. up to the present time. About three years ago, M'r Porter, of the house of Fleming Brothers, came to see me, making complaint of the change of color of printing their labels; explained to him the difficulty of keeping the plates, that they had been using for many years, of uniform tint or color—the character of the work showing wear and less color. I suggested for them to change their labels, and having them engraved with modern lathe-work, and a newer style. I used every argument to induce him to let us engrave the plates in such a way as to be creditable to ourselves, stating that if he would do so we could guarantee to keep the label-plates and print uniform impressions all the time, and he would be relieved from the complaints of the gray impressions from the worn plates. He said we might engrave new plates, provided they should be in every respect the same as the label they were using, except the change of No. of the street, and leaving off the words J. Kidd & Co. I explained that we should be obliged to change the character of the lines in the background. He objected to any change being made, and could not understand why we could

136 not produce the same effect as with their old arrangement of line, insisting, strenuously, "that no change in the appearance of the label must be made: that it was their trade-mark, and that no money would induce them to change it." This last expression was made some weeks after the first conversation about the new plate.

I visited New York about this time, and made known to the American Bank-Note Co. there the contract which I had made with Fleming

Brothers for supplying their labels, stating that I would guarantee to give uniform impressions, and that they, Fleming Brothers, would not be required to pay for further*ing* engraving, the plates to be counterparts of the old ones, or the ones they were then using. The American Bank-Note Co. took the liberty of changing the design, and engraving a new plate, sending me proof of same, which I tried to induce Fleming Brothers to use, which Fleming Brothers returned to me, insisting that no change would be permitted, under any circumstances; that we must make the new plates the counterpart of the old; that it must have precisely the same character. Having made the contract to give them, Fleming Brothers, uniform color in their labels, we became responsible for the wear of plates, as they could not be charged for engraving
137 new ones by this last agreement. We engraved new plates, adhering to the old style that they had been using.

In order to be able to give uniform impressions, we made use of different ruling-machine line, but adhering as near as possible to the character of their old label. The reason for this change which we made was to get a line that would wear better than the old & abandoned character. The conversations that were had about these labels was that there must be no material change. I answered that the changing of this line would be no material change to them; that it was the only means by which we could give them just what they wanted, a uniform color in their labels. To have given them precisely the same arrangement of line would have subjected us to the same complaints they had for years been making to my predecessor.

(J. G. & H. Douglass, att'ys for def't, excepts to all of the foregoing answer, commencing with the words after the words that "M'r Porter, of Fleming Brothers, came to see me," and to each sentence and paragraph after those words specifically and separately excepted to the close of the answer.)

Question. State whether or not, in your conversation with M'r Porter, or with Fleming Brothers, in reference to the making of the new label, any allusion was made to the label used by J. H. McLean, of S't Louis.

138 (J. G. & H. Douglass, att'ys for def't, objected to the question as being irrelevant and leading.)

Ans. He did not; they did not. I was not cognizant of any such party.

Ques. State whether or not, in making the new label, you preserved the same general appearance and size of the old one?

(J. G. & H. Douglass, att'ys for def't, now asks the witness to produce the old and the new labels & exhibit them to the def'ts att'ys. The def'ts att'ys excepts to the question.)

Ans. We did as near as possible, leaving out the words J. Kidd & Co., which makes the new label appear a little more open on account of the omission of those words. This effect could not be avoided in making that omission.

Ques. State whether or not you are acquainted with the label used by D'r J. H. McLean, at S't Louis, on pills made and sold by him.

(Question objected to by J. G. & H. Douglass, att'ys for def't, and asks the production of the labels he saw, and which he refers to.)

Answer. I saw the label about one year ago. It was the first time that I became aware of any such label.

Question. Please state to what is attributable any change in the dark color to a light in those labels.

(Objected to by def't's att'ys.)

139 Answer. The natural wear of the plates. Steel plates are subject to the same effects of using as type or wood-cuts from long use; also changes are made from different manufactors' ink, some being more intense in their colors. For instance, a plate that commences to wear, the strength and the color is increased by addition of blue in greater quantities, and using richer blacks. When the plate wears, the line opens and the edges of the line become rounded and will not hold the ink, as when newly and freshly engraved, particularly if these lines are bitten with acids as rulings are produced, and also shadings; where there is much of this kind of work it soonest wears away and shows dim in the impression.

Question. State the reasons for the charge in the color of the label of Fleming Brothers, referred to by you.

(Objected to by def't's att'y.)

Answer. It was of that delicate character of ruling that I have just described, which would soon show signs of wear, and for this reason I persuaded Fleming Brothers to have a new and stronger character of plate engraved; they insisting, however, that it must be like the plate they had been using for over twenty years.

I now desire to amend my testimony as to answer 3d, that we
140 were to engrave the new label after the style of the old one, with the exception of change in the No. of the street, and leaving off the words J. Kidd & Co. I should have added successors to J. Kidd & Co. Also, in answer No. 5, the words "successors to Kidd & Co."

The def't, not waiving any exceptions to the testimony heretofore taken, proceeds to cross-examine:

Question. Please examine the paper now shown you, marked "Exhibit A", and state if this is the engraving you referred to as made by your company for Fleming Brothers.

Answer. This is an impression from the last plate engraved for them.

Question. When did you make this plate from which this is an impression?

Answer. Without reference to my books, should say about three years ago.

Question. To your personal knowledge, and without regard to talk, did you make any other plate or engraving for McLane, of Pittsburgh, or any parties acting for him, or any parties representing McLane's pills of Pittsburgh, Pa.?

(Objected to by A. H. Clark, att'y for plaintiff.)

Answer. The only parties I have known personally were the Fleming Brothers, and F. E. Porter, whom I became acquainted with whilst learning the engraving business, when the plate used previous
141 to the one just engraved was made in 1854 or 1855, and which was used *used* up to three years ago. By plate I mean dies from which new plates were transferred, the original dies being engraved in 1854 or 1855.

(Answer objected to by def't, as not being responsive to the question.)

Question. Was not the original dies you speak of engraved?

Answer. They were.

Question. How many dies were used in the printing of the original label, as you state were made in 1854 or 1855, without any further explanation or talk?

Answer. One die—engraved numerous transfers from that, and plates

Brothers for supplying their labels, stating that I would guarantee to give uniform impressions, and that they, Fleming Brothers, would not be required to pay for further*ing* engraving, the plates to be counterparts of the old ones, or the ones they were then using. The American Bank-Note Co. took the liberty of changing the design, and engraving a new plate, sending me proof of same, which I tried to induce Fleming Brothers to use, which Fleming Brothers returned to me, insisting that no change would be permitted, under any circumstances; that we must make the new plates the counterpart of the old; that it must have precisely the same character. Having made the contract to give them, Fleming Brothers, uniform color in their labels, we became responsible for the wear of plates, as they could not be charged for engraving
137 new ones by this last agreement. We engraved new plates, adhering to the old style that they had been using.

In order to be able to give uniform impressions, we made use of different ruling-machine line, but adhering as near as possible to the character of their old label. The reason for this change which we made was to get a line that would wear better than the old & abandoned character. The conversations that were had about these labels was that there must be no material change. I answered that the changing of this line would be no material change to them; that it was the only means by which we could give them just what they wanted, a uniform color in their labels. To have given them precisely the same arrangement of line would have subjected us to the same complaints they had for years been making to my predecessor.

(J. G. & H. Douglass, att'ys for def't, excepts to all of the foregoing answer, commencing with the words after the words that "M'r Porter, of Fleming Brothers, came to see me," and to each sentence and paragraph after those words specifically and separately excepted to the close of the answer.)

Question. State whether or not, in your conversation with M'r Porter, or with Fleming Brothers, in reference to the making of the new label, any allusion was made to the label used by J. H. McLean, of S't Louis.

138 (J. G. & H. Douglass, att'ys for def't, objected to the question as being irrelevant and leading.)

Ans. He did not; they did not. I was not cognizant of any such party.

Ques. State whether or not, in making the new label, you preserved the same general appearance and size of the old one?

(J. G. & H. Douglass, att'ys for def't, now asks the witness to produce the old and the new labels & exhibit them to the def'ts att'ys. The def'ts att'ys excepts to the question.)

Ans. We did as near as possible, leaving out the words J. Kidd & Co., which makes the new label appear a little more open on account of the omission of those words. This effect could not be avoided in making that omission.

Ques. State whether or not you are acquainted with the label used by D'r J. H. McLean, at S't Louis, on pills made and sold by him.

(Question objected to by J. G. & H. Douglass, att'ys for def't, and asks the production of the labels he saw, and which he refers to.)

Answer. I saw the label about one year ago. It was the first time that I became aware of any such label.

Question. Please state to what is attributable any change in the dark color to a light in those labels.

(Objected to by def't's att'ys.)

139 Answer. The natural wear of the plates. Steel plates are subject to the same effects of using as type or wood-cuts from long use; also changes are made from different manufactors' ink, some being more intense in their colors. For instance, a plate that commences to wear, the strength and the color is increased by addition of blue in greater quantities, and using richer blacks. When the plate wears, the line opens and the edges of the line become rounded and will not hold the ink, as when newly and freshly engraved, particularly if these lines are bitten with acids as rulings are produced, and also shadings; where there is much of this kind of work it soonest wears away and shows dim in the impression.

Question. State the reasons for the charge in the color of the label of Fleming Brothers, referred to by you.

(Objected to by def't's att'y.)

Answer. It was of that delicate character of ruling that I have just described, which would soon show signs of wear, and for this reason I persuaded Fleming Brothers to have a new and stronger character of plate engraved; they insisting, however, that it must be like the plate they had been using for over twenty years.

I now desire to amend my testimony as to answer 3d, that we
140 were to engrave the new label after the style of the old one, with the exception of change in the No. of the street, and leaving off the words J. Kidd & Co. I should have added successors to J. Kidd & Co. Also, in answer No. 5, the words "successors to Kidd & Co."

The def't, not waiving any exceptions to the testimony heretofore taken, proceeds to cross-examine:

Question. Please examine the paper now shown you, marked "Exhibit A", and state if this is the engraving you referred to as made by your company for Fleming Brothers.

Answer. This is an impression from the last plate engraved for them.

Question. When did you make this plate from which this is an impression?

Answer. Without reference to my books, should say about three years ago.

Question. To your personal knowledge, and without regard to talk, did you make any other plate or engraving for McLane, of Pittsburgh, or any parties acting for him, or any parties representing McLane's pills of Pittsburgh, Pa.?

(Objected to by A. H. Clark, att'y for plaintiff.)

Answer. The only parties I have known personally were the Fleming Brothers, and F. E. Porter, whom I became acquainted with whilst learning the engraving business, when the plate used previous
141 to the one just engraved was made in 1854 or 1855, and which was used *used* up to three years ago. By plate I mean dies from which new plates were transferred, the original dies being engraved in 1854 or 1855.

(Answer objected to by def't, as not being responsive to the question.)

Question. Was not the original dies you speak of engraved?

Answer. They were.

Question. How many dies were used in the printing of the original label, as you state were made in 1854 or 1855, without any further explanation or talk?

Answer. One die—engraved numerous transfers from that, and plates

made from those transferred rolls, from which any number of impressions can be repeated on the steel plates.

Question. Do you pretend to say that the steel plate originally used in 1854 or 1855 was used from that time to the time Exhibit A was made, without change of the impressions of the plate?

Answer. There were a number of plates made from that die, and I know of no change being made in the original die.

Question. Well, I understand you, that at any time from the original die that you can make a new plate; is that so?

142 Answer. Yes. But a die is subject to wear, and the original die spoken of, being weak in the first place, began to give way, and this was an additional reason for wishing to give them a sounder character of work in the last engraved plates, which we had contracted to keep in order, without expense to Fleming Brothers, and enabling us better to give them uniform color in their labels.

(Objected to by def't, after the word "yes," as not being responsive to def't's question.)

Question. Have you seen A. H. Clark, or had any conversation with him, after this morning's examination, and prior to the recommencing of his direct examination this afternoon?

(Objected by A. H. Clark, pl'ff's att'y, as being irrelevant, incompetent, claiming that he has the right, and that it is his duty to see and converse with the witness at any time, so as to know to what he can testify.

Def't's att'y claims that he has no right to talk to a witness on the stand, or during recess of court, during examination.)

Answer. I did; M'r Clark asking me for an impression of the old plate, which I gave.

Question. Was this all the conversation that you had with him, and how long was you with him, and where?

(Objected to by A. H. Clark, pl'ff's att'y, on the same grounds as in the preceding objections.)

143 Answer. We walked two blocks to my office, where I explained the process of plate-printing whilst impressions were being taken from old plates. I called his attention to the change of color, and also to the words "successors to," which I had omitted in my statement in the morning. I was with him about a quarter of an hour.

Question. How many impressions were taken from the old plates?

Answer. Three impressions. One was perfect, the other two were poor; and I understand that M'r Clark took the other two. I having given the perfect one to him myself.

Jacob S. Merrill—Deposition of.

My name is Jacob S. Merrill; my age is 46; my business is a manufacturing and wholesale druggist; my residence, S't Louis. I am acquainted with defendant, James H. McLean. I have known him a little over 20 years. I have seen him write. From twenty years till about twelve years ago I had a good deal of business with him, and saw him write often, and was often in his office. My dealings with McLean extended from 1853 to the spring of '59.

Question. Look at Exhibit O, J. H. B., attached to the deposition of Cochran Fleming, filed in this case January 8, 1873, and state if you know in whose handwriting it is?

144 Ans. I think that is the handwriting of James H. McLean. I refer to the body of the letter as well as to the signature, and I

would like to add but the signature more especially; I mean, I am very certain that is his signature to that paper.

Question. Look at Exhibit P, J. H. B., attached to the deposition of said Cochran Fleming, and state in whose handwriting the instrument and signature is.

Ans. I think that's in J. H. McLean's handwriting; I mean the body of the letter and the signature also.

Quest. In like manner look at Exhibit O, J. H. B., attached to the said deposition of Cochran Fleming, and state in whose handwriting the instrument and signature is.

Ans. I think the whole letter is in the handwriting of J. H. McLean, and the signature also.

Cross examination:

Ques. Your acquaintance, then, with M'r McLean's handwriting was between '53 and '59?

Ans. It was.

Felix Caste—Deposition of.

My name is Felix Caste; I am 52 years of age; my residence is S't Louis; my business is various. I am president of the Bank of Commerce. I am acquainted with M'r J. H. McLean, and have known him for 10 or 15 years. I do not know that I ever saw him write, but
145 I familiar with his signature to checks on the S't Louis Building and Savings Association, and on the Bank of Commerce, of which two institutions I have been president. D'r McLean has done business with the two institutions for a long time—5 or 6 years. The transactions of D'r McLean with the S't Louis Building and Savings Association were, that he had deposited money there on time, and had left his signature on the signature-book, and drew out that money on his checks. The S't Louis Building & Savings Association has changed its name to the Bank of Commerce. The signature of D'r McLean to checks on those banks with which I am familiar were recognized by him in his transactions with those banks.

Question. Look at the signatures to papers marked "Exhibit O, J. H. B.," and "Exhibit P, J. H. B.," and "Exhibit Q, J. H. B.," attached to the deposition of Cochran Fleming, filed in this cause January 8th, 1873, and which are also marked, in red ink, by the commissioner taking this deposition, severally "Exhibit O, A. D.," "Exhibit P, A. D.," and "Exhibit Q, A. D.," and state in whose handwriting the signature to said several documents is.

Ans. The one marked "Exhibit O, A. D.," in red ink, differs somewhat from his signature to checks, but I should say is the signature of D'r J. H. McLane. The signature to Exhibit P, J H. B., in
146 red ink, differs somewhat from his signature to checks, in this, that James is written out in full, and McLean differs some too. I could not say anything as to the signatures to Exhibits P and Q, not having seen them written in that way. I have no belief upon the subject.

Cross-examination:

Q. The only knowledge you have of D'r McLean's signature is by comparison with checks upon which he drew money at your bank?

A. That's all. I am not an expert at handwriting.

Jacob S. Merrill—Deposition of.

My name is Jacob S. Merrill; my age 45 years; my residence, S't Louis; and my occupation, druggist. I have been engaged in the drug business 28 years, 19 of them in S't Louis. I am wholesale and manufacturing. I have dealt in proprietary goods the last 15 years pretty extensively; manufacturing and putting up proprietary goods has been rather a specialty with me. The manufacturing for 28 years, and manufacturing and putting up 15 years. What is meant by proprietary goods, is store goods, in which the manufacturer or original vendor claims the exclusive proprietorship. It is anonymous with "patent medicine." I know the defendant, James H. McLean. Have
147 known him 19 years in S't Louis. I know that he puts up a pill called D'r J. H. McLean's Universal Pill, for liver complaint. These pills are known in the trade as "D'r J. H. McLean's Pills." He commenced putting up this pill in November, 1854. The first batch of them was made November 21st, 1854. He may have put up a few boxes a few weeks before this, but it was all done in November of that year. The first mass or batch of them was delivered to him on that day, that is, the 21st day of November, 1854. He wanted me to get him up a good liver pill, and I gave him the same pill I was getting up and selling to other parties.

Q. State what conversation you had with D'r J. H. McLean, any time, in regard to the making, putting up, and selling those pills.

(Objected to, as assuming a conversation, and also immaterial and leading in its character.)

Ans. I had, along about that time, a good deal of conversation with D'r J. H. McLean about getting up this pill. There was considerable conversation about the style of the pill and the style of the label. He stated that in selling other medicines he was having calls for McLane's pills, which were at that time largely sold. Those McLane pills were manufactured by Jo'n Kidd & Co., of Pittsburg. He thought
148 that as his name was McLean, he could get up a pill and sell it McLane's pills. I mean that, if a man should come in and ask for a dozen of McLane's pills, he could sell him his own.

Q. At that time, so far as you know, had he or any one else made or sold any article of pills known as McLean's, or D'r J. H. McLean's, pills?

(Objected to as immaterial.)

A. That I can answer by saying there had none.

Q. Please continue your statement of conversations with him in regard to making, putting up, or selling his pills.

(Objected to as immaterial.)

Ans. I recollect our conversation, which was repeated several times, that occurred in showing me C. McLane's labels. He showed me a sketch of one that he was going to get up. He stated that the C. McLane trade-mark was "McLane's Liver Pills"; that he could avoid that by calling his "McLean's Universal Pills for Liver Complaint," and that the word liver would stand out so prominent on the label that most people would never notice the difference. I think that is about all. That tenor of conversation ran along for months, and, in fact, for years, for we were at that time intimate and friendly, and are still,
149 except that that particular conversation which I have narrated occurred prior to my making the batch of pills mentioned.

(Answer objected to by def't's att'y as not responsive to the question.)

I think I have stated the purport of all the conversations which occurred between us. The sketch he showed me was simply a drawing for a lithographer to ahead and make a label from. He got up a label similar to it—just about like it. He got up the label just about that time.

Q. Look at Exhibit A, and state how the label which you say D'r J. H. McLean began to use about that time, compares with it in general appearance.

A. I can't say positive. I am quite certain that the words "Universal Pills," on second line on the label, on top of the box, was a straight line, while on this Exhibit A it is a curved line or crooked line. Another point in our conversation, I recollect, which just occurs to me: He spoke of having his label made with a red letter and white ground. I don't recollect how in general appearance this compares. The most that I could say is, that there seems some similarity, but still there was a difference.

150 Q. In your conversations with D'r J. H. McLean, what, if anything, was said by him about imitating as closely as possible, or safe, the label of D'r C. McLane's liver pills?

(Objected to.)

A. I don't recollect, except the general purport of the conversations, which was, that he wanted to get up a label as near like it as he safely could to avoid legal difficulty.

Cross-examination:

At that time there was a great many other pills made in the country.

Q. Was there not a similarity between the manner in which they were all put up?

(Objected to, as immaterial.)

A. No, sir.

Q. Well, a great many of them?

A. I think, of the leading pills, there were not more of these wrappers than 4; I can't think of but two now.

Q. Was there not a similarity between C. McLane's and these others?

(Same objection.)

A. Somewhat similar.

Q. Then you say there were several pills in the market of a general similarity?

A. There were from 2 to 4, and after D'r J. H. McLean was
151 added there was one more. At the time of which I speak there was but one McLane's pills.

Q. You stated that in conversation with D'r J. H. McLean he wished to avoid any legal difficulty?

Ans. Yes, sir.

Q. Did you mean by that, that he didn't desire to make a pill closely enough resembling D'r C. McLane's to infringe upon his legal rights?

(Objected to, as calling *of* a conclusion of the witness, and not a fact.)

A. I mean that he didn't mean to make a pill so near *a*like it that he would be legally prohibited from it.

Q. Did he put his name upon this label that he showed to you?

A. Yes, sir; he had it on in two places.

Q. How; prominently, or otherwise?

A. Yes, sir; as prominently as is usual in a label of that size.

Q. You stated that the words "Universal Pills" was on the in a straight line?

A. That is my impression.

Q. Was that also prominent?

A. I can't say whether it would be considered prominent or not. I very readily distinguished the difference between the label of D'r J. H. McLean and D'r C. McLane. I am not an orthographer.

152 Q. In his conversation, in which he said people came in and called for D'r McLane's pills, did he depend more upon the similarity of the sound of their names than upon the similarity of his pills?

A. Don't hardly know how to answer that question, unless I may say, I suppose he did.

Q. Did he not state to you that as his name was McLean he had the right to sell pills of his own make, under his own name?

A. I presume he did, but don't recollect the words.

Q. You stated that the word "liver" stood out more prominently than anything else?

A. In that draft it did.

Q. Did it stand out more prominently than the word "universal"?

A. I think it did; but I am not certain about the labels.

Q. Did you not state in your direct examination that you did not recollect the word "universal" at al'?

A. No, sir.

Q. You don't know whether D'r McLean made pills prior to '54, do you?

A. I do not; but I think he did not. I should have known it if he had.

Q. Do you know whether he ever used this label or not—the
153 label he had been speaking about, and showed you?

A. I don't know whether he used the exact label, but one similar to it.

Q. Did you examine the one similar?

A. No, sir.

Charles Hamilton—Deposition of.

Q. What is your name?

A. Charles Hamilton.

Q. Where do you reside?

A. In S't Louis.

Q. What is your age?

A. 30 years.

Q. What is your occupation?

A. Lithographic printer. Eight years ago I was employed, both with Alexander McLean and McKiltrick & Co. McLean was a lithographer. His place of business was at the southeast corner of Third & Pine streets, in the city of St. Louis. I know D'r J. H. McLean by sight—am not otherwise acquainted with him. He was always ordering labels of Alexander McLean. I don't remember the dates of these orders now. He got pill-labels printed in red ink—white letter with red ground; these were intended for wrappers for pill-boxes. It was in September, 1864, I left there, but whether he got them in '64,
154 I can't remember. I don't remember the dates of any of his orders. We were getting orders for different labels frequently.

(Exhibit A here shown witness, and he was asked to look at this label and state whether the labels he got were like that.)

A. The general appearance is the same. To a printer it is different. Those I worked on were straight lines on the background—this has waving lines. The borders, I think, is different. This one has fancy

borders, and those I worked on had plain. I worked on those which J. H. McLean got. The resemblances between this one and those which D'r J. H. McLean got, are the color of the ink and the style of the lettering—the style of the lettering is the same, and so is the ink. The lettering has dark shades and light background on both. In size and shape, I think this the same as those he got. I have seen Exhibit L of plaintiff's bill in this case, on file in the clerk's office, in the custom-house over the post-office. Said Exhibit L is just the same as that, we—that is, Alexander McLean—manufactured for D'r J. H. McLean. I saw it between half past one and two o'clock to-day. Up to the time I left Alexander McLean, D'r J. H. McLean had never had labels for pills manufactured in black ink. If any such had been manufact-
155 ured by Alexander McLean for him, I would have known it. I left Alexander McLean's employ in September, '64; I had been with him 8 or 9 years, but can't remember when D'r J. H. McLean began getting these labels from him. To the best of my judgment it must have been 3 or 4 years prior to my leaving him. A person not a lithographer I don't think would notice the difference between the straight and crooked lines on these labels.

Cross-examination:

The difference in the borders, which I spoke of in my direct examination, is that D'r J. A. McLean's had a plain line border—it was a smaller border than this one, I think. It could scarcely have been distinguished from this of Exhibit A if one had been looking for the difference. There couldn't be much difference in the lettering. The reaching of the lettering is different, but the general appearance is the same. J. H. McLean's lines were straight, and his lines were a little heavier than this. If the borders were straight and the lines heavier, it would not very materially change the appearance of the label. It would depend upon the amount of ink used. It was prior to '64, that J.
156 H. McLean had the red labels printed. Don't know whether he had any printed since then or not, nor whether he any printed in '64.

Redirect examination.

The difference in the border of Exhibit A and the labels manufactured by Alexander McLean for J. H. McLean, is not, I think, such a difference as a person not a lithographer would be likely to take notice of.

W. M. Rutan—Deposition of.

I am 35 years of age; reside in Lamonte, Pettis County, Missouri; my business is that of a grocer and liquor-dealer; lived at Lamonte little over 3 years. Last fall I ordered 2 doz. boxes of McLane's Liver Pills from D'r J. H. McLean, at St. Louis. I retained a copy of the order; Exhibit A is a copy of said order, which was sent at the time it bears date, November 3d, 1871. The order was filled by sending me 2 doz. boxes J. H. McLean's Universal Pills. I have some of the boxes I received, one of which is here attached as Exhibit B. The lot was sent to me by express, with letter here attached, marked "Exhibit C." I also received a bill, here attached & marked "Exhibit D," which accompanied the goods. I remitted to him the amount of the bill, for which, I think, I received an acknowledgment, but if I did, it is lost.

Cross-examination:

157 I am in the retail grocery and liquor business, and do not deal in medicines. The reason I sent for these pills is that it was

suggested to me by M'r Porter; I mean the gentleman present, F. E. Porter.

(Witness identifies F. E. Porter, the agent of Cochran Fleming, as the gentleman to whom he referred.)

I had no other reason for it. I knew nothing about D'r J. H. McLean, & did not know what medicines he dealt in. I have given all the reason I had, & didn't know but I might be called upon as a witness. There was nothing said to me at the time about being a witness, but something may have been said about it before he left; he was about here some time. D'r J. H. McLean did not solicit my patronage; did not get it by deception or misrepresentation prior to my order, but when I ordered I did not know what I would get; supposed I would get pills, but did not know what kind I would get.

Exhibit A attached to deposition.

LAMONTE, *Nov.* 3, 1871.

J. H. MCLEAN, *S't Louis:*

SIR: Send me, p'r express, 2 doz. boxes McLane's Liver Pills, C. O. D.

W. M. RUTAN.

Exhibit B is a box of pills, and will be hereto attached.

158 *Exhibit C attached to deposition.*

OFFICE OF D'R J. H. MCLEAN,
S't Louis, Nov. 4th, 1871.

M'r W. M. RUTAN, *Lamonte, Mo.:*

D'R SIR: Y'rs 3d rec'd. I enclose invoice for pills, as ordered. You will please remit by mail & save expense by C. O. D.

Awaiting further favors,
I am y'rs resp't'ly,

J. H. MCLEAN,
TAYLOR.

Exhibit D attached to deposition.

S'T LOUIS, *Nov'r* 4, 1871.

M'r W. M. Rutan, Lamonte, Mo., bought of D'r J. H. McLean, 2 doz. McLean's Un'l Pills 1.50,..... 3 00
One p'k'ge p'r exp's.

Joseph B. Neal—Deposition of.

I am forty-two years of age. I reside in the vicinity of Lexington, Lafayette County, Missouri. I am a farmer. I ordered pills from D'r James H. McLean, one box of them, on the 21st day of November, A. D. 1871. I ordered a box of D'r McLane's Liver Pills by letter directed to D'r James H. McLean at S't Louis. I enclosed in the letter money to pay for the pills, nothing else. Exhibit A attached to my depo-
159 sition is a copy of my letter sent by me to D'r J. H. McLean, ordering the pills. The letter was sent by mail; the order was filled by sending back to me by mail a box of D'r James H. McLean's

Liver Pills. I did not receive the kind of pills I ordered, viz, the Pittsburg pill. My impression is that no letter accompanied the box of pills I received. I have the box received, also the envelope enclosing it. The box of pills is attached to my deposition, marked "Exhibit B." The envelope enclosing the box, as I received it by mail, is herewith attached, marked "Exhibit C."

Cross-examination:

I am not extensively engaged in farming; I am in no particular business. I sent to James H. McLean, of S't Louis, for the Pittsburg McLane pill at the request of M'r F. E. Porter, the agent of Cochran Fleming, the complainant in this suit. I can't say that I had any particular expectations of testifying in this suit at that time. My memory is not very *clar* as to this. I saved the box & envelope at M'r F. E. Porter's request. They must have been preserved as evidence in this case. I would not have saved them for any other purpose. I never had any communication with D'r James H. McLean, of S't Louis, excepting this transaction.

Question. Did D'r James H. McLean, of S't Louis, or his
166 agents, ever by misrepresentations, deception, or counterfeit labels, or otherwise, solicit your patronage or induce you to purchase his pills?

Ans. He never did. I presume M'r Porter furnished the postage stamps to pay for the pills I sent for. I remember remitting something to pay for the pills I ordered, but whether it was money or postage stamps I did not remember without referring to the copy of my letter to D'r James H. McLean; from reference to that I have no doubt I sent stamps and not money.

Re-examination:

Ques. What do you mean by saying you are in no particular business?

Ans. When the question was asked me I understood it to mean if I was engaged in any business aside fro n . I am engaged in farming and no other business. I don't do much of that.

Exhibit A attached to deposition.

LEXINGTON, MO., *Nov.* 21, 1871.

D'r J. H. MCLEAN:

D'R SIR: Enclosed find 12 postage stamps. Send by mail one box D'r McLane's celebrated liver pills.

Respectfully yours,

JOS. B. NEAL.

Exhibit B is a box of pills, and will be attached hereto.
161 Exhibit C is an envelope addressed to deponents, on which is the postmark "S't Louis, Mo.," and also the business card of D'r J. H. McLean.

Gustav Ettmueller—Deposition of.

My age is 29 years. I reside in Herrmann, Missouri. My occupation is physician and druggist. I have been engaged as druggist at this place for about a year and a half. I also deal in patent medicines. I have dealt in D'r McLane's Liver Pills. I ordered some of D'r McLane's Liver Pills from D'r James H. McLean; this was in October, 1871.

Exhibit A in this deposition is a copy of the letter which I wrote at that time to D'r J. H. McLean, of S't Louis, ordering those pills. In answer to this order I received two dozen McLean's Universal Pills. That was what I expected, because he is no wholesale dealer and don't keep any but his own. I have a box of pills of the kind which I received of D'r J. H. McLean upon the order which I have mentioned. Exhibit B to my deposition is one of the boxes of pills as I received it from D'r J. H. McLean, and is the same kind of pills with which my order, Exhibit A, was filled.

Cross-examination:

I expected to receive none, or if he filled my order he would send his Universal Pills. I sent the order at the request of M'r Porter. (The witness identifies M'r Porter, the agent of Cochran Fleming, as
162 the gentleman at whose request he sent the order.) At that time I did not know that M'r Porter was the agent for M'r Fleming. I knew that D'r J. H. McLean was a manufacturer of medicines, and manufactured his Universal Pills. I suppose that he did not deal in any other medicines. When I received the pills I immediately saw they were not the pills I had sent for, and was astonished that he had filled the order; but if he would fill the order I did not expect to receive any other than those he sent. I talked with M'r Porter and sent the order at his request to see what pills McLean would send. I told M'r Porter that D'r McLean would not fill the order if I sent for D'r McLane's Liver Pills, because I did not suppose he kept them.

Exhibit A attached to deposition.

HERMANN, MO., *Octo.* 23, '71.

D'r J. H. MCLEAN, *S't Louis, Mo.:*

DEAR SIR: Please send me by return train p. U. S. E., C. O. D., 2 doz. McLane's Liver Pills, & oblige,

Yours, truly,

D'R G. ETTMUELLER.

Exhibit B, box of pills.

James B. Fulton—Deposition of.

My name is James B. Fulton. I am forty-eight years old. I reside in Cairo, Illinois. I am a steamboat engineer by occupation.
163 On the fourth day of March, A. D. 1872, I ordered one box of McLane's Celebrated Liver Pills by letter addressed, mailed & directed to D'r J. H. McLean, S't Louis. I enclosed some three-cent postage-stamps in the letter to pay for a box of pills. I requested the pills sent to me by mail. Exhibit A, attached hereto, is a copy of the letter I wrote D'r J. H. McLean ordering the box of pills. I sent for the kind of pills that I saw advertised in the Western Methodist. I received a box of pills in answer to that letter. The label is not the same, & the name is not the same on the label as I ordered. The box marked "Exhibit B" on the label thereof, is the box that I received in answer to my order, and was received by me through the mail in the envelope hereto attached, marked "Exhibit C." I received D'r J. H. McLean's Universal Pills. Prior to sending this order I was familiar with & had used D'r McLane's Celebrated Liver Pills. I had lived in Pittsburgh. There was nothing in the envelope but the box of pills.

Cross-examination:

I am engaged at present as a steamboat engineer, & am so employed now. I had known D'r J. H. McLean, of S't Louis, by reputation, prior to sending this order, but was not personally acquainted with him. I had not had any business or communication with him prior to
164 this. I don't recollect whose advertisement it was I saw in the paper. I directed my letter according to the advertisement, I am pretty certain. I was not a subscriber to the Western Watchman at that time & never was. The paper from which I got this advertisement was shown to me by M'r Porter. He showed me that paper for the purpose of writing for these pills. He requested me to do it. He did not furnish me the money to send for them, but he furnished me the postage-stamps that I sent for them. I mean M'r F. E. Porter, the agent of Cochran Fleming. I could not say whether it was Cochran Fleming's advertisement, or not.

(Admitted by complainant's counsel, that it was Cochran Fleming's advertisement.)

Question. Did D'r J. H. McLean, of S't Louis, or his agents, ever by misrepresentation, deception, or counterfeit labelling solicit your patronage, or induce you to purchase his pills?

(Question objected to by defendant's counsel as irrelevant and incompetent.)

Answer. He never did.

Exhibit A attached to deposition.

CAIRO, ILL'S, *M'ch 4th*, 1872.

J. H. MCLEAN, *S't Louis:*

I have seen D'r McLane's advertisement in the Western Metho-
165 dist, offering to send to those wishing to make a trial of D'r McLane's Celebrated Liver Pills, by mail one box, by enclosing twelve three-cent stamps. I have enclosed the stamps. Please send by mail one box to

JA'S B. FULTON,
Cairo, Ill's.

Exhibit B, box of McLean's pills.

Alfred Foster—Deposition of.

My name is Alfred Foster, and my place of residence is Ridge Farm, Vermillion County, and State of Illinois. I have no special occupation at present. Until the 6th of last October I was merchandizing in this place. I ordered on the 9th October, 1871, from James H. McLean, 1 box of D'r McLane's Liver Pills—I ordered them by letter mailed to D'r J. H. McLean, at S't Louis, Missouri. I enclosed in that letter thirty-six cents in postage-stamps—in my opinion they were three-cent stamps. Exhibit A attached to this deposition is a copy of the letter I sent to D'r J. H. McLean, ordering the pills. I received in answer to that letter twelve boxes of D'r J. H. McLean's Universal Pills. The box marked on the label "Exhibit B," is one of the boxes of pills as I received it on the order I have mentioned.

Cross-examination:

166 I sent for the pills at the request and suggestion of M'r Frank

Porter, who says he is the agent of Cochran Fleming, complainant, to the best of my recollection. M'r Porter furnished the stamps which I sent for the pills. I never had any communication with D'r J. H. McLean or his agents prior to the sending of this order. Never had any other transaction with him but this one.

Question. Did D'r James H. McLean, or his agents, ever by misrepresentation, deception, counterfeit labels, or otherwise, solicit your patronage or induce you to buy his pills?

(Objected to as irrelevant and incompetent.)

Answer. No, sir.

Exhibit A attached to deposition.

RIDGE FARM, ILL'S, *Oct. 9th*, 1871.

I send you twelve postage-stamps, for which send me one box of D'r McLane's Liver Pills by mail, to

A. FOSTER.

D'r J. H. MCLEAN, *S't Louis, Mo.*

Exhibit B, box McLean's pills.

George A. Dice—Deposition of.

My name is George A. Dice; my age is twenty-four; my residence, Ridge Farm, Vermillion County, State of Illinois; my occupation
167 is a druggist. I ordered some pills and volcanic oil from D'r J. H. McLean, by letter directed to him at Saint Louis, Missouri. I ordered D'r McLane's pills, 2 dozen, October 9th, 1871. I received D'r McLean's Universal Pills. Exhibit C attached to my deposition is a copy of the letter I sent, ordering the pills and oil. Received a bill by mail for the pills and oil which I had ordered. Exhibit D is the bill which I received. Exhibit E is a box of pills which I received on the order Exhibit C.

Cross-examination:

M'r Porter requested me to send for these pills spoken of in my deposition. He furnished the money to pay for them. I had never ordered any from D'r McLean prior to that. I received some of D'r McLean's advertisements, and knew from them only he was in business.

Question. Did D'r J. H. McLean or his agents ever, by misrepresentation, deception, or counterfeit labels, induce you to buy his pills?

(Objected to as irrelevant and immaterial.)

Answer. He never did. By the M'r Porter I spoke of, I mean the gentleman present, who says he is the agent of Cochran Fleming, the complainant.

Re examination:

Question. What kind of pill did you receive in response to your order, Exhibit C?

168 (Objected to as not having grown out of cross-examination, and having been gone over before by the examination-in-chief.)

Answer. I received McLean's Universal Pills.

Question. What further communication, if any, did you have with J. H. McLean in regard to the kind of pills he sent you?

(Objected to for the reasons above stated.)

Answer. I wrote to D'r J. H. McLean that he had not sent me the

pill ordered and he sent me the reply which is annexed and marked "Exhibit F."

Exhibit C attached to deposition.

RIDGE FARM, ILL'S, *Oct. 9th*, 1871.

D'r J. H. MCLEAN, *Saint Louis:*

DEAR SIR: Please send us by express, C. O. D., to Paris, Ill's, 2 doz. Volcanic Liniment, small size; 2 doz. D'r McLan's Liver Pills.

Send in care Mess. Hunter, Carey & Co., Paris, to be for'd by hack, & oblige.

Yours, very truly,

HAROLD & DICE.

Exhibit D attached to deposition.

S'T LOUIS, *Oct'r 11th*, 1871.

Mess. Harold & Dice, Ridge Farm, Ill's, bought of D'r J. H.
169 McLean 2 doz. McL'n Vol. Oil Lin'nt, 1.65, 3.30; 2 doz. Un'l Pills, 1.50, 3.00—$6.00; one p'k'g, freight prepaid to Paris, care Hunter, Corey, &c., to be forward'd by hack.

Exhibit F attached to deposition.

OFFICE OF D'R J. H. MCLEAN,
S't Louis, Nov. 7th, 1871.

MESS'RS HARROLD & DICE,
Ridge Farm, Ill's:

GENTS: Yrs. 4th, with $6.30, rec'd, in full of a/c, for which accept thanks. I enclose my price-list; will send you any quantity in dozen lots, as quoted, & regret error in first order, & to make amends would say will forward the 2 doz. Liver Pills any way you deem proper to order; would be less expense of course to pack with other goods.

I also enclose receipt for the 2 doz. Universal Pills, which you will please hold on com'n, if no objections, & return rec'pt signed, & oblige,

Yours, res't'ly,

J. H. MCLEAN,
TAYLOR.

John Z. Jones—Deposition of.

My name is John Z. Jones; my age is 73 years; I reside in Greencastle, Putnam County, Indiana; my occupation is that of a hotel-keeper on a small scale. On the 14th of April, 1872, I sent to D'r
170 J. H. McLean, of S't Louis, an order for one box of D'r McLane's celebrated Liver Pills, and enclosed in the letter twelve postage-stamps to pay for them. The letter ordering the pills and enclosing the stamps I directed *I directed* to D'r J. H. McLean, S't Louis, Mo. Exhibit A attached to this deposition is a copy of the letter which I sent to D'r McLean ordering the pills. In answer to that order I received a box of pills in an envelope. The box of pills, with label thereon, is attached to this deposition, and marked "Exhibit B," and the envelope in which said box of pills was enclosed is also attached to this deposition and marked "Exhibit C."

Cross-examination:

I sent for the pills at the suggestion of this gentleman sitting here (pointing to M'r F. E. Porter), who says he is the agent of Cochrane Fleming. M'r Porter bought the stamps enclosed in the letter for the pills. I never heard of J. H. McLean before I sent for the pills. I got my information of him from M'r Porter. I did not directly need the pills at the time that I sent for them. I had previously used the pills about the house. I sent for the pills at M'r Porter's suggestion.

Question. Did D'r J. H. McLean, of S't Louis, or his agents,
171 ever, by misrepresentation, deception, counterfeit labels, or otherwise, solicit your patronage, or induce you to buy his pills?

Answer. No.

(The above question is objected to as leading and irrelevant).

Re-examination:

Question. Please repeat what you said in your cross-examination about seeing the advertisement in the paper, and state what pills you saw advertised there?

(Objected to as not growing out of the cross-examination, as secondary evidence.)

Answer. I saw D'r McLane's celebrated Liver Pills advertised there. I don't remember the signature at the bottom of the advertisement, but I do remember distinctly the words McLane's celebrated Liver Pills. I do not remember who the advertiser was.

Exhibit A attached to deposition.

GREENCASTLE, INDIAN', *April 11th*, '72.

M'r D'r J. H. McLEAN.

SIR: I send you twelve postage-stamps, for which I wish you to send me one box of Doctor McLane's celebrated Liver Pills. I re'd the advertisement in the S't Louis Christian Advocate, stating that by sending twelve three c'ts stamps I would receive by mail a box of the
172 pills. You will mail to Greencastle, Putnam County, Indiana, to

JOHN F. JONES.

Exhibit B is a box of D'r J. H. McLean's Pills.

Exhibit C is an envelope mailed at S't Louis and addressed to John F. Jones.

Joseph W. Barker—Deposition of.

Question. State your name, age, and occupation.

Answer. My name is Joseph W. Barker; age, forty-three; occupation, printer. I am now connected with the Southwestern Book and Publishing Company, in S't Louis. The S't Louis Christian Advocate is published by that office. The S't Louis Christian Advocate has been published in this city since 1852 or 1853. I have been connected with the paper since September, 1854. I had charge of the press work up to about 1861 or 1862, then I took whole charge of the office.

Q. State whether Fleming Brothers, of Pittsburgh, had any advertisements published in that paper?

(Objected to by solicitor for defendant as immaterial.)

A. They had.

Q. State between what dates?

A. It was in the last half of 1872 and the beginning of 1873.

(Objected to by solicitor for defendant as having occurred since the beginning of this suit and as immaterial.)

173 Q. State what that advertisement was, or produce a copy if you can.

A. I here produce two advertisements marked A & B, which were published, the one in one week, and the other in the next week, alternately from April 12, 1872, to April 12, 1873.

Q. State whether any prior advertisements were published in your paper by Fleming Brothers.

A. I am not aware there were.

Q. State whether you have made further examination as to the time during which the advertisements A & B were published in the S't Louis Christain Advocate.

A. I have; on going back to the office, and taking the two papers from which I cut the advertisements from, I found I had given the wrong dates; these advertisements were published in the last part of '71 and '72, instead of, as I previously stated, '72 & '73.

Q. State the dates of the papers from which these advertisements were cut, and whether these are the papers.

A. January 31, 1872, and March 27, 1872, and I now produce the two papers from which those advertisements are cut, and marked severally C and D, and made exhibits hereto.

Q. State as near as you can the time that the advertisements

174 A & B were first published in the Advocate.

A. In April, 1871, and continued till April, 1872.

Q. State whether D'r James H. McLean had any advertisements published in the S't Louis Christian Advocate, and, if so, during what time.

A. I believe, so near as I can recollect, he had advertisements about 1857 or '58. Don't know of any since. I was in charge of the press-work at that time, and not in charge of the whole office.

Q. Have you made any examination to the effect whether D'r McLean had any advertisements in the paper of late years?

A. I state I have made no examination with regard to D'r J. H. McLean, of S't Louis, but I am well satisfied in my own mind he has had none.

Q. If he had had any, state whether you would have means of knowing it.

A. I certainly would have means, for they all go through my hands.

Exhibit A, attached to deposition, is as follows:

D'r McLane's Celebrated Liver Pills.

For the cure of hepatitis or liver complaint, dyspepsia, and sick headache.

SYM'TOMS OF A DISEASED LIVER.

Pain in the right side, under the edge of the ribs, increases on

175 pressure; sometimes the pain is in the left side; the patient is rarely able to lie on the left side; sometimes the pain is felt under the shoulder-blade, and it frequently extends to the top of the shoulder, and is sometimes mistaken for a rheumatism in the arm. The stomach is affected with loss of appetite and sickness, the bowels in general are costive, sometimes alternative with lax; the head is troubled with pain, accompanied with a dull, heavy sensation in the back part. There is generally a considerable loss of memory, accompanied with a painful sensation of having left undone something which ought to have

been done. A slight, dry cough is sometimes an attendant. The patient complains of weariness and debility; he is easily startled, his feet are cold or burning, and he complains of a prickly sensation of the skin; his spirits are low, and although he is satisfied that exercise would be beneficial to him, yet he can scarcely summon up fortitude enough to try it. In fact, he distrust' every remedy.

Several of the above sym'toms attend the disease, but cases have occurred where few of them existed, yet examination of the body, after death, has shown the liver to have been extensively deranged.

AGUE AND FEVER.

176 D'r McLane's Liver Pills, in cases of ague and fever, when taken with quinine, are productive of the most happy results. No better cathartic can be used preparatory to or after taking quinine. We would advise all who are afflicted with this disease to give them a fair trial.

Address all orders to Fleming Bro's, Pittsburgh, Pa.

P. S.—Dealers and physicians ordering from others than Fleming Bro's will do well to write their orders distinctly, and take none but D'r McLane's, prepared by Fleming Bro's, Pittsburgh, Pa.

To those wishing to give them a trial, we will forward per mail, postpaid, to any part of the United States, one box of pills for twelve three-cent postage-stamps, or one vial of Vermifuge for fourteen three-cent stamps.

All orders from Canada must be accompanied by twenty cents extra.

Sold by all respectable druggists and country storekeepers generally.

Exhibit B, attached to deposition, is as follows:

D'r McLane's Celebrated American Worm Specific or Vermifuge.

SYM'TOMS OF WORMS.

The countenance is pale and leaden-colored, with occasional flushes, or a circumscribed spot on one or both cheeks. The eyes become
177 dull; the pupils dilate; an azure semicircle runs along the lower eyelid. The nose is irritated, swells, and sometimes bleeds. A swelling of the upper lip. Occasional headache, with humming or throbbing of the ears. An unusual secretion of saliva. Slimy or furred tongue. Breath very foul, particularly in the morning. Appetite variable, sometimes voracious, with a gnawing sensation of the stomach; at others, entirely gone. Fleeting pains in the stomach. Occasional nausea and vomiting. Violent pains throughout the abdomen. Bowels irregular, at times costive. Stools slimy, not unfrequently tinged with blood. Belly swollen and hard. Urine turbid. Respiration occasionally difficult and accompanied by hiccough. Cough sometimes dry and convulsive. Uneasy and disturbed sleep, with grinding of the teeth. Temper variable, but generally irritable, &c.

Whenever the above sym'toms are found to exist, D'r McLane's Vermifuge will certainly effect a cure.

The universal success which has attended the administration of this preparation has been such as to warrant us in pledging ourselves to the public to return the money in every instance where it should prove
178 ineffectual, providing the sym'toms attending the sickness of the child or adult should warrant the supposition of worms being the

cause. In all cases the medicine to be given in strict accordance with the directions. We pledge ourselves to the public that D'r McLane's Vermifuge does not contain mercury in any form, and that it is an innocent preparation, not capable of doing the slightest injury to the most tender infant.

Address all orders to Fleming Bro's, Pittsburgh, Pa.

P. S.—Dealers and physicians ordering from others than Fleming Bro's will do well to write their orders distinctly, and take none but D'r McLane's, prepared by Fleming Bro's, Pittsburgh, Pa. To those wishing to give them a trial, we will forward, per mail, post-paid, to any part of the United States, one box of pills for twelve three-cent postage-stamps, or one vial of Vermifuge for fourteen three-cent stamps. All orders from Canada must be accompanied by twenty cents extra.

For sale by druggists and country storekeepers generally.

Henry Boemler—Deposition of.

My name is Henry Boemler. I was 28 years of age on the 22d of February, 1873. Am reading law at M'r Kellogg & Woods, No. 517½ Chestnut street. I live in S't Louis. I went down to examine
179 the Christian Advocate yesterday, on Washington avenue, Nos. 510 and 512, at the office of the Southwestern Publishing Co., S't Louis. I found the files of the paper beginning with 1850, and I examined the files up to the 10th of April, 1872. I found the weekly numbers from 1850 to somewhere in 1862. The last paper, as near as I can get at it, was on April 17, 1862. The publication of the paper began again in 1865, but I cannot say at what precise date. I found files from 1865 to 1872.

I examined the files. I looked over each sheet and column of each issue from 1850 to 1872. I found advertisements purporting to be from D'r J. H. McLean. I found the first one, under date August 12th, 1858, in volume 7, No. 51. It continued till the 10th of April, 1872. I found it there all the time. I here produce a copy of the advertisement (Exhibit E). I found another advertisement besides the one heretofore mentioned, a copy of which I now produce, marked "Exhibit F." I found no other advertisements of D'r J. H. McLean except the two produced between 1850 and the 10th of April, 1872.

Cross-examination:

Q. The form of the advertisements, Exhibits E and F, may have been changed at times.

Re-examination:

180 Ques. Did you find anywhere any advertisement relating to D'r McLane's pills except Exhibit F?

(Objected to by solicitor for defendant as having been gone over before, and not growing out of cross examination.)

Ans. No other kind.

Exhibit E, attached to deposition, is as follows:

MCLEAN'S STRENGTHENING CORDIAL AND BLOOD-PURIFIER.

The greatest remedy in the world.

This cordial is distilled from a berry known only to myself, and chemically combined with some of the most valuable medicinal roots, herbs,

and barks known to the mind of man, viz: bloodroot, blackroot, wild-cherry bark, yellow dock, dandelion, sarsaparilla, elder flowers, with others, producing the most infallible remedy for the restoration of health ever known. It is nature's own remedy, curing disease by natural laws. When taken, its healing influence is felt coursing through every vein of the body, purifying and accelerating the circulation of the blood. It neutralizes any bilious matter in the stomach and strengthens the whole organization.

McLean's Strengthening Cordial will effectually cure liver complaint, dyspepsia, jaundice, chronic or nervous debility, diseases of the
181 kidneys, and all debilities arising from a disordered liver or stomach, heartburn, inward piles, acidity or sickness of the stomach, fullness of blood to the head, dull pain or swimming in the head, palpitation of the heart, fullness or weight in the stomach, sour *emel*ations, choking or suffocating feeling when lying down, dryness or yellowness of the skin and eyes, night-sweats, inward fevers, pain in the small of the back, chest, or side, sudden flushes of heat, depression of spirits, frightful dreams, languor, despondency, or any nervous disease, sores or blotches on the skin, and fever and ague (or chills & fever).

It will cure all diseases of the bladder and womb, such as seminal weakness, incontinence of urine, strangnary, inflammation or weakness of the womb or bladder, whites, &c.

There is no mistake about it. This cordial will never fail to cure any of the above diseases if taken per directions on each bottle, in German, English, & French. One-half million of bottles have been sold during the past six months, and in no instance has it failed in giving entire satisfaction. Who, then, will suffer weakness or debility when McLean's Strengthening Cordial will cure you?

To the ladies: Do you want to be healthy and strong? Then
182 go at once and get some of McLean's Strengthening Cordial. It will strengthen and invigorate your blood to flow through every vein, and the rich, rosy bloom of health to mount your cheeks again. Every bottle warranted to give satisfaction.

For children: we say to parents, if your children are sickly, puny, or afflicted with complaints prevalent among children, give them a small quantity of McLean's cordial and it will make them healthy, fat, and robust. Delay not a moment; try it and you will be convinced. It is delicious to take. Every country merchant should not leave the city until he has procured a supply of McLean's Strengthening Cordial. It sells rapidly because it always cures.

A liberal discount will be made to those who buy to sell again.

CAUTION.—Beware of druggists or dealers who may try to palm upon you some bitters or sarsaparilla trash which they can buy cheap, by saying it is just as good. Ask for McLean's Strengthening Cordial, and take nothing else; it is the only remedy that will purify the blood thoroughly, and at the same time strengthen the system.

One tablespoonful taken every morning (fasting) is a certain preventive for cholera, chills and fever, yellow fever, or any prevalent disease.

Price $1 per bottle, or six for $5.

183 J. H. McLEAN,

Sole Proprietor of the Cordial. Also McLean's Volcanic Oil Liniment.

Principal depot on the corner of Third and Pine street, St Louis, Mo.

For sale in Louisville by Bell, Talbot & Co., Spring & Co., and Raymond & Patten.

Exhibit F attached to deposition.

D'R M'LEAN'S UNIVERSAL PILLS.

For liver complaint, biliousness, headache, &c., &c.

There has never been a cathartic medicine offered to the public that has given such entire satisfaction as McLean's Universal Pills.

Being entirely vegetable, they are perfectly innocent, and can be taken by the most tender infant; yet prompt and powerful in removing all bilious secretions, acid, or impure, fetid matter from the stomach. In fact they are the only pill that should be used in malarious districts. They produce no griping, sickness, or pain in the stomach or bowels, though very active and searching in their operations, promoting healthy secretions of the liver and kidneys.

Who will suffer from biliousness, headache, and foul stomach, when so cheap a remedy can be obtained? Keep them constantly on
184 hand; a single dose taken in season may prevent hours, days, and months sickness. Ask for D'r McLean's Universal Pills. Take no other. Being coated they are tasteless. Price only 25 cents per box, and can be sent to any part of the United States.

J. H. McLEAN,
Sole Proprietor, cor. Third and Pine street, S't Louis, Mo.

James A. Yantes—Deposition of.

My age is twenty-one years. I reside at Sweet Springs, near Brownsville, Saline County, Missouri. I have lived there off and on all my life. I was born there. On the 15th day of November, 1871, I wrote to James H. McLean, or McClain, I think, McLean, of S't Louis, Missouri, an order for one box of McLane's Celebrated Liver Pills, to be sent by mail, and enclosed in my letter twelve postage-stamps. Exhibit A is a copy of the order which I sent to D'r McLean for these pills. I made this copy at the time I wrote the order. In answer to that order I received a box of pills, which is attached to this deposition and is marked "Exhibit B." I received it in a letter by mail—I mean in an
185 envelope. I have forgotten whether it was D'r McLean's envelope or not. I think it was. I don't think that there were any writing enclosed. When I received the box of pills I don't think the label was torn as it is now.

Cross-examination:

M'r Walton came to me and asked me if I did not want to go to S't Louis; I think he said as a witness in this case. I know he did before he got through with the conversation. He told me that M'r Porter wanted to see me. He, M'r Porter, then took me into a room and had me to send for the pills spoken of. M'r Porter furnished the stamps. I had no use in the world for the pills. D'r James H. McLean used no misrepresentation, deception bylabels or otherwise, to obtain his (my) patronage or order for these pills, unless he did it through M'r Porter. (Witness identifies F. E. Porter, the agent of Cochran Fleming, the complainant in this suit, as the M'r Porter spoken of in this examination.) I don't think M'r Walton told me he had authority to act for M'r Porter; he may have done it; I don't remember. I don't remember whether M'r Walton requested me to see M'r Porter, or whether he said M'r Porter wanted to see me, or whether he sent M'r Porter to me di-

rectly after this conversation. M'r Porter & I met, as above
186 stated, and I suppose as the result of the conversation had with M'r Walton.

Re-examination:

Quest. Did you get the kind of pills you ordered?

(Objected to by the defence as not growing out of the cross-examination.)

Ans. I did not. In saying I was not deceived by D'r McLean I mean that I was not deceived into buying his pills, having no use for them.

Exhibit A attached to deposition is as follows:

BROWNSVILLE, MO., *Nov.* 15, 1871.

Send me one box of D'r McLane's Celebrated Liver Pills by mail. I enclose twelve (12) postage-stamps.

Direct to Brownsville, Saline Co., Mo.

Respt.,

J. A. YANTES.

Exhibit B is a box of D'r McLean's pills.

James R. Walton—Deposition of.

My age is thirty years. I reside in Brownsville, Saline County, Missouri. My occupation is farming. I ordered some pills from D'r James H. McLean, of S't Louis, on the 12th Nov'r, 1871. I gave the order by letter, sent by mail. Exhibit C attached to this deposition is a copy of the letter I sent to D'r J. H. McLean ordering the pills. I enclosed in that order twelve postage-stamps to pay for the pills. I received
187 no reply except an envelope containing a box of pills; not such as I ordered, however. I ordered a box of D'r McLane's Liver Pills. I received a box of Universal Pills. I have a box of pills; I am not certain that it is the one I received from D'r McLean, but when I received that I compared it with the one received by M'r Yantis, and they were identically the same. (Exhibit B to deposition of James A. Yantis is here shown to witness, who says:) This is just like the one I received in answer to my order. I received no letter from D'r McLean with the box of pills.

Cross examination:

I do not know D'r McLean. I have had no communication with him only this one, and then only in the manner detailed. Never had any communication with him or any of his clerks or agents except in ordering this box of pills. I do not remember as to whether I was sick at the time of ordering the pills. I did not expect to take them anyhow. I did not deal in pills. I ordered them at M'r Porter's request. I had no other reason for ordering them.

Quest. Did D'r McLean or his agents, by misrepresentation, deception, or by counterfeit labels, or in any other manner, solicit your patronage, or induce you to buy his pills?

188 Ans. No, sir. M'r Porter paid for the pills which I bought.

(The witness here identifies M'r F. E. Porter, who admits that he is the agent of Cochrane Fleming, and that he is the M'r Porter referred to.)

M'r Porter requested me to find some reliable person whom he could get to order a box of pills. I saw M'r Yantis about it. M'r Porter af-

terwards endorsed my action in the matter. I rather expected to be a witness in a case to be brought about these pills, though I was not certain, as M'r Porter seemed to be in doubt about bringing the suit. I asked M'r Yantis how he would like to go to S't Louis in the event of a suit. He said he had no objections to going if I went. We both concluded to go if necessary. We expected to go there to testify that we ordered one box of pills and got another. We expected to go as witnesses in this suit.

Exhibit C, attached to deposition, is as follows:

BROWNSVILLE, MO., *Nov. 12th*, 1871.

D'r MCLEAN:

D'r SIR: Please find enclosed twelve postage-stamps, for which you will send me by mail one box of D'r McLane's Liver Pills, & oblige.

Yours, &c.,

J. R. WALTON.

Albert P. Delamater—Deposition of.

My age is twenty-four years: my residence is Brownsville, Sa-
189 line County, Mo. I have resided in Brownsville over three years. My business is that of a druggist. I have been engaged in that business seven years, and have been so engaged all the time that I have lived at Brownsville. Patent medicines form a part of our stock, and I sell them at retail. The agent of D'r James H. McLean has called upon (me) two or three times since I have been in business here. I do not know the name of the agent. He is rather an elderly gentleman. He was here two or three times. We commissioned his Ague Pills, and, I think, his Universal Pills. He wanted to sell me a gross of Universal Pills. I told him that our demand was principally for the Pittsburg Pills, the McLane Pittsburg Pill. He said that these pills were cheaper, as good, and resembled so closely, and the people buying did not know which pill in particular, I mean between those two, they wanted, only knowing the name of McLean or McLane's Pills. He said that he was satisfied that their almanac created as much demand for C. McLane's Pills as they did for their own. I told him that we had had no real demand for J. H. McLean's Pills that I knew of, and refused to buy a gross, but took, I think, two dozen of his pills. He sent us some of his almanacs.

Cross examination:

190 Quest. Did not McLean's agent convey to you the idea that the chief similarity was in the name?

Ans. I did not so understand it. He said the names were alike in sound, and the general appearance of the boxes were similar. Our demand is chiefly for the Pittsburg pills. I did not disagree with him upon the ground of the similarity of the pills, but that our demand was for the Pittsburg McLane Pills.

Quest. Did he state you that his almanacs were largely circulated, and that his pills were well advertised?

Ans. He did.

Quest. Did he state that to induce you to buy his pills?

Ans. He did.

Quest. Do you know M'r Porter, M'r Yantis, & M'r Walton?

Ans. I do. I am very intimate with M'r Walton & M'r Yastis. We are together a great deal. I am not very intimate with M'r Porter.

Charles A. Benson—Deposition of.

My name is Charles A. Benson. Aged 36. Occupation now a manufacturer. Have been engaged as a druggist until last fall. Have been engaged in the drug business nineteen years, in Pittsburgh, P'a, and Rock Island, Ill's. I dealt in all kinds of patent medicines, and
191 sold them at wholesale and retail. I am familiar with an article of medicine known as D'r McLane's Celebrated Liver Pills, manufactured and put up by Cochrane & Fleming, Pittsburgh. I have known these pills to have been put and sold for nineteen years. I have recently, last fall, sent an order to S't Louis for these pills. As near as I can recollect, it was in September or October, 1871. The order was for two dozen McLane's Liver Pills. It was sent to J. H. McLean, S't Louis. I sent at the same time for two dozen strengthening cordial. I sent nothing accompanying the order; merely ordered the articles. My order for the pills was filled, but not with the right kind. I received J. H. McLean's Universal Pills, two dozen of them, the number I called for. (The witness here produces one box of pills around which is a label with this card printed thereon: "D'r J. H. McLean's Universal Pills," which is marked "Exhibit A," and made a part of this deposition.) The small label with the words, "Agents for Rock Island, T. H. Thomas & Co., druggists, opp. Rock Island House," was not on the box when I received it; it has since been put on. Exhibit B, attached to this deposition, is the bill which I received with the pills from D'r J. H. McLean.

Question. From your experience as a retail druggist please
192 state to what extent, in your opinion, the pills put up & sold in the manner and style of Exhibit A could be disposed of as the pills called D'r McLane's Celebrated Liver Pills, in consequence of the similarity of the labels upon the boxes.

(Objected to because of its being immaterial, and because there has been no foundation laid.)

Answer. I could substitute this pill for the McLane pill, twice out of three times. I mean at retail.

Ques. Have you any further answer to make to this question?

Ans. There is a similarity between this box of pills and the McLane's pills, that I could deceive two out of three.

(Objected to by defendant's counsel, because the answer is not responsive to the question.)

Quest. State whether or not there is any general resemblance in appearance of the label on Exhibit A to the labels used on the boxes of McLane's Liver Pills, and, if so, whether or not it would enable the one contained in Exhibit A to be sold & substituted for McLane's Celebrated Liver Pills.

(Objected to by defendant's counsel because it has been gone over before & already stated, and because it is leading in its character.)

193 Ans. There is similarity enough to substitute this pill for D'r McLane's Celebrated Liver Pills.

Ques. Have you any copy of the order you sent to D'r J. H. McLean for pills and cordial, as you have stated?

Ans. I kept a copy; I sold out my store and it was afterwards destroyed.

Ques. State particularly what kind of cordial you ordered at that time, so far as you recollect.

Ans. I ordered McLean's cordial.

Cross-examination:

I am at present engaged as a manufacturer of wagons. I know M'r Porter, the agent of Cochrane Fleming, complainant. I have known him ever since I was a boy. I know D'r J. H. McLean only by reputation. I am not personally acquainted with him. I have known his house for a dozen of years as manufacturing patent medicines, such as Strengthening Cordial, J. H. McLean's Universal Pills, Worm Lozenges & Volcanic Oil Liniment. I knew he did not manufacture D'r McLane's Celebrated Liver Pills. I sent for D'r McLane's Celebrated Liver Pills at the suggestion and request of M'r Frank Porter, agent of Cochrane Fleming. I was not induced to buy D'r J. H. McLean's Universal Pills through any deception, misrepresentation, or counterfeit labelling of D'r J. H. McLean or his agents. I did not expect to
194 be a witness in this case, neither did I know there was any suit pending. M'r Porter simply asked me to order two dozen of D'r McLane's Liver Pills, and D'r J. H. McLean's Cordial. I had no further conversation with M'r Porter. As an experience' hand I could discriminate between the two pills, but I could deceive two out of three purchasers. The similarity exists in the wrapper, in the letters, and in the style of the engraving.

Question. What peculiarity is there in D'r McLane's Celebrated Liver Pills which you suppose to be imitated by Exhibit A?

Ans. The general appearance of the letters *the letters*, and the steel engraving and the name.

Ques. Is the name of D'r J. H. McLean's Universal Pills so much like the name D'r C. McLane's Celebrated Liver Pills, that an observer could not tell them apart?

Ans. A close observer might tell them apart, but two out of three would not.

Ques. Are the letters not prominent in Exhibit A?

Ans. They are.

Ques. Couldn't every school-boy in the land read it?

Ans. I think he could.

Ques. Is the lettering on D'r McLane's Celebrated Liver Pills easily read?

Ans. It is.

195 Ques. Is that the greatest similarity you observe in Exhibit A of D'r McLane's Liver Pills?

Ans. That and the words "Liver Pills."

Re-examination:

Ques. In speaking of the similarity between the names on the two labels, did you refer to the style of lettering or the spelling of the name?

Ans. To the lettering and the sound.

Exhibit A referred to is a box of D'r McLean's pills.

John H. Byrne—Deposition of.

Int. 1. What is your name, age, and place of residence?

Ans. My name is John H. Byrne. My age is 31 years. I reside in the city of Chicago, county of Cook, and State of Illinois.

Int. 2. What is your business; how long and where have you been engaged in it?

Ans. I am a druggist. I have been engaged in the business 18 years, 8 years in Chicago and 10 years in England.

Int. 3. State what your experience is in selling patent or manufactured articles, whether small or limited.

Ans. I have had a large experience, wholesale and retail.

Int. 4. State whether you are acquainted with D'r C. McLane's
196 pills, as made and sold by the firm of Fleming Brothers, of Pittsburg, and whether you have dealt in them, and for how long.

Ans. Yes, I am acquainted with them; have dealt in them for over 8 years.

Int. 5. State whether you are familiar with Fleming Bro's label or trade-mark, used by them on pills made and sold by them. (Shown a box of pills, marked "Exhibit A," with label thereon.)

Ans. I am perfectly familiar with it, and this box has their label or trade mark upon it.

Int. 6. What is the reputation of these D'r C. McLane's Pills, and by what name are they usually known and bought and sold among dealers and consumers?

Ans. They are well known as a good liver pill, and are known as McLane's Liver Pills.

Int. 7. Do you know the label used by D'r J. H. McLean on pills made and sold by him?

(Shown a box of pills, which is hereto attached, marked "Exhibit B.")

Ans. I do, and I recognize this box as marked "Exhibit B" as his manufacture.

Int. 8. By what name are they bought and sold?

Ans. McLean's Liver Pills.

Int. 9. How is the name McLean ordinarily pronounced?

Ans. McLean, the same as the other.

197 Int. 10. Have you ever bought and sold these pills made by D'r J. H. McLean?

Ans. I have.

Int. 11. Well, do you know of defendant's goods being bought and sold as and for plaintiff's?

Ans. I do. I have bought and sold them myself. I never paid any attention to the difference at all, and have shipped them wholesale indiscriminately.

Int. 12. Look at the boxes marked "Exhibits A and B," with labels thereon, and state the resemblance, if any, between them.

Ans. I have examined the boxes marked "Exhibits A & B." The size and form and color are alike, the general appearance is alike, and would be taken for the same by the majority of consumers.

Int. 13. Take the boxes out of the labels, and state whether you find any resemblance?

Ans. They are almost identical, the size, shape, and seal.

Int. 14. Look at this box marked "C" and state whether you find any resemblance to "Exhibit A," and, if yea, state what that resemblance is.

(Box of pills marked "C," with initials, referred to, but not attached as an exhibit herewith.)

Ans. They are very much alike in size, shape, & style of lettering. In the prominence of the words "Liver Pills" they more closely resemble "A."

198 Int. 15. Please give your opinion as a dealer whether the labels of the defendant could be used to sell his pills as and for the pills of plaintiff.

Ans. I think they could, and I have done so.

Int. 16. State whether or not there is a general resemblance between the labels of plaintiff & defendant.

Ans. I think they closely resemble each other.

Int. 17. State whether the defendant's manner of putting up his pills, and the use of the label thereon, is calculated to deceive any class of customers; and, if yea, what class?

Ans. I think they are calculated to deceive the majority of consumers.

Int. 18. Well, state whether there is substantial similarity between them or not.

Ans. I think it would require to be familiar with them, and require close inspection to tell the difference.

Int. 19. State whether they show a design to deceive, and whether the resemblance is such as to make it an imitation of plaintiff's label.

Ans. It is my impression they were intended as an imitation.

(The witness was here shown two packages marked E and F, referred to but not attached as exhibits.)

199 Int. 20. Look at these labels and state whether there is a resemblance.

Ans. They are very much alike.

Int. 21. State whether or not the use of defendant's red label on boxes of pills like those used by plaintiff, Fleming, defendant's article could be sold as and for the article of plaintiff, and whether it is calculated to deceive purchasers.

Ans. I think they could be sold for each other and would deceive almost any consumer.

Int. 22. If plaintiff and defendant were using the red labels E & F referred to, and plaintiff should change to dark label A, and thereafter defendant should change to the dark label B referred to, and the last label C referred to, what would it indicate to your mind, as a dealer?

Ans. That it was intended to counterfeit the plaintiff' label.

Int. 23. If plaintiff, having adopted the use of a red seal on boxes of pills made by him, and thereafter defendant having adopted a red seal upon a box of pills made by him, what would that indicate to your mind, as a dealer?

Ans. That it was intended to deceive. It is an unusual mark on a box of pills.

William W. Crane—Deposition of.

Interrogatory 1st. What is your name, age, and residence?

200 Answer. My name is William W. Crane. I am forty-three years of age. My residence is at No. 385 White street, in the city of New Orleans, State of Louisiana.

Int. 2nd. What is your business, and how long and where have you been engaged in it?

Ans. I am a druggist, and a dealer in patent medicines. I am now in the drug business in the city of New Orleans. I have been in the drug business since the year 1846; sometimes at Cincinnati, and at New Orleans.

Int. 3rd. What is your experience in selling patent or manufactured articles? Is it large or limited?

Ans. My experience is large. I have been in the wholesale and retail business principally. I have been in the patent medicine trade for the last ten years.

Int. 4th. State whether you are acquainted with D'r C. McLane's pills, as made and sold by the firm of Fleming Bro's, of Pittsburgh, Pennsylvania.

Ans. I am. I have sold them for the past eighteen years, in the wholesale and retail trade.

Int. 5th. State whether you are familiar with Fleming & Bro's label or trade-mark used by them on pills made and sold by them.

(Witness shown box marked "Exhibit A," and attached hereto.)

Ans. I am. I recognize that Exhibit A as their manufacture.

201 Int. 6th. What is the reputation of D'r C. McLane's pills, and by what name are they usually bought and sold among dealers and consumers?

Ans. The reputation is very good, has a large sale, and known as D'r. McLane's Pills.

Int. 7th. Do you know the labels used by D'r J. H. McLean on pills made and sold by him?

(Witness shown box marked "Exhibit B," and attached hereto.)

Ans. I recognize these pills.

Int. 8th. By what name are they bought and sold?

(Objected to by defendant's counsel, on the ground that the Exhibit B speaks for itself.)

Answer. These are frequently bought and sold (spelt) as McLane's pills. With experts, they are known to the trade as (spelt) D'r McLean's pills.

Int. 9th. How is the name of McLean ordinarily pronounced?

Ans. The same as McLane. They are both pronounced alike.

Int. 10th. State whether or not you know of defendant's pills having been sold as, or substituted for, the pills of plaintiff; and, if yea, state instances.

Ans. Yes; in Mississippi they have not only been sold as such, but have been left in the place of (spelt) D'r C. McLane's pills, under

202 the supposition that they were the same pills as D'r C. McLane's. J. H. McLean's agent, in travelling through the country, would leave McLean's pills in place of McLane's pills with the impression that he was taking them up because they were not fresh and that he wished to exchange them to get his pills into the market, and take up D'r C. McLane's pills, which he could readily sell elsewhere.

Int. 11th. Look at boxes marked Exhibits A and B, and state the resemblance, if any there be, between them.

Ans. There is a very close resemblance, likely to deceive any person not familiar with any of them.

Int. 12th. Take the boxes out of the labels, and see if you discover any resemblance between them.

Ans. The resemblance is very close. The sealing-wax on the top of the boxes are very much alike, and the shape of the boxes are the same in shape and style, and would very naturally deceive any one not familiar with them.

Int. 13th. Look at box marked "C," with initials "P. A. H.," "J. H. B," & "W. B. K," attached hereto, and referred to in depositions taken at Chicago and Pittsburgh, and state whether you find any resemblance to Exhibit A.

Ans. I find a very close resemblance; one likely to deceive most anybody.

203 Int. 14th. Please give your opinion, as a dealer, whether the labels of defendant could be used to sell his pills as and for the pills of plaintiff.

Ans. I think they could, as it has been done to a very large extent.

Int. 15th. State whether or not if there is a general resemblance between the labels of defendant and plaintiff.

Ans. I think the resemblance very close; calculated to deceive anybody.

Int. 16th. State whether or not defendant's manner of putting up his pills, and the use of the labels thereon, is calculated to deceive any class of customers; and, if yea, what class.

Ans. Yes: consumers.

Int. 17th. State whether or not there is a substantial similarity between them.

Ans. I think there is.

Int. 18. State whether or not, in your opinion as a dealer, the resemblance is such as to constitute an imitation.

(Objected to by defendant's counsel, for this: that it is not within the province of witness to pass judgment herein.)

Ans. I do.

Int. 19th. (Witness here shown box marked "E," with initials "W. A. H.," "F. H.," "C. G. J.," "J. H. B.," & "W. B. K.," and box marked
204 "F.," with initials "W. A. H.," "F. H.," "C. G. J.," "J. H. B.," and "W. B. K.," referred to in depositions in this case taken at St Louis, Cincinnati, Chicago, and Pittsburgh, and now attached hereto, and the several depositions taken in this city, and asked to state the resemblance between them, if any.)

Ans. The wrapper is the same color, the lettering very nearly the same, and displayed very nearly alike: the size of the box is the same. Taken all together, I consider it a very close resemblance. Most people not familiar with them would not know the difference.

Int. 20th. State whether or not defendant's red label is calculated to mislead or deceive customers and the public generally.

Ans. It is; and has done it to a very great extent. I consider that the red label was a very serious injury to C. McLane's pills.

Int. 21st. If plaintiff and defendant were using the red labels marked "E" and "F," and plaintiff should change to the dark label A, and thereafter the defendant should change his manner of putting up pills to the dark labels B and C, what inference would you, as a dealer, draw from such change?

(Objected to by defendant's counsel, on the ground that the inference, if any, was to be drawn by the court, and not by the witness.)

205 Ans. That defendant was trying to sell his pills on plaintiff's reputation.

Int. 22d. Plaintiff having adopted a red seal upon his boxes of pills, and thereafter defendant having a similar red seal upon pills of his manufacture, what inference would you, a dealer, draw from such act?

(Objected by defendant's counsel, on the same grounds as the preceding.)

Ans. That he was trying to make them as much like plaintiff's pills as possible on purpose of misleading the public.

Int. Please state, as near as you can, what the amount of sales of D'r C. McLane's pills in this vicinity are in comparison to those manufactured by other parties.

Ans. I think they stand among the leading pills; that the sale in this city, in one year, amounted to two thousand gross. I amend this by saying twelve hundred gross.

Cross interrogatories:

Int. 1st. In what establishments have you served in this city?

Ans. Scovir & Mead, James Gonegar, E. J. Hart & Co., where I am at present.

Int. 2d. At what place in Mississippi, and by whom, were defendant's pills sold as or substituted for the pills of plaintiff?

206 Ans. At Fayette and Port Gibson; but the parties' names I do not recollect.

Int. 3d. Was this sale or substitution, to your personal knowledge, authorized by defendant?

Ans. No, sir.

Int. 4th. Please state the source of your knowledge of defendant's pills being sold as and for pills of plaintiff.

Ans. In travelling, and in stores, I frequently saw McLean's, where they have been purchased at a less price and for McLane's pills.

Int. Do you know, of your own knowledge, which of these pills were started first?

Ans. I do not; and I did not hear of D'r J. H. McLean's pills for some years after the D'r C. McLane pill.

Int. Do you know, of your own knowledge, which of these parties first adopted the red seal?

Ans. I do not. I first saw them on McLane's pills.

Int. Are not the dissimilarities in these pills in favor of defendant; and that defendant's are as well known, and in equal demand, *and* if not more so, than plaintiff's?

Ans. I think the dissimilarities are not in favor of defendant's, and they are not as well known, and have not an equal demand.

207 Int. Are not defendant's pills more saleable in the market than those of plaintiff?

Ans. They are not.

Int. Have you any personal or pecuniary interest in this matter?

Ans. None whatever.

Re examined:

Int. State whether or not, in your opinion, *in* the sale of D'r J. H. McLean's pills have been gained upon the reputation of the D'r C. McLane's pills.

Ans. I think, in the start, it was built upon the reputation of D'r C. McLane's pills.

John M. Rohbock—Deposition of.

Int. 1st. Please state your name, age, and residence.

Ans. My name is J. M. Rohbock; age, 38 years; and my residence is corner of Washington and S't Charles streets, New Orleans.

Int. 2d. What is your business; how long and where have you been engaged in it?

Ans. My business is a druggist. I have been engaged in it for 20 years, in Pittsburgh, Cincinnati, and New Orleans.

Int. 3d. What is your experience in selling patent or manufactured articles—large or limited?

Ans. My experience is large, both wholesale and retail.

208 Int. 4th. State whether you are acquainted with D'r C. McLane's pills, as made and sold by the firm of Fleming Bro's, of Pittsburgh.

Ans. I am.

Int. 5th. State whether you are familiar with label or trade-mark of Fleming Bro's upon these pills?

(Witness shown box, marked "Exhibit A," attached to these depositions.)

Ans. I recognize these as being McLane's Genuine Liver Pills, and also recognize the wrapper on those pills.

Int. 6th. What is the reputation of these pills; and by what name are they usually bought and sold among consumers and dealers?

Ans. The reputation is very good and extended, and they are known by the name of McLane's Liver Pills.

Int. 7th. Do you know the labels used by D'r J. H. McLean on pills made and sold by him?

(Witness shown box, marked "B," attached to these depositions as exhibit.)

Ans. I recognize this as D'r J. H. McLean's pills.

Int. 8th. By what name are these pills bought and sold?

(Objected to by defendant's counsel, on the ground that Exhibit B speaks for itself.)

Ans. McLean's Pills.

209 Int. 9th. How is the name McLean ordinarily pronounced?

Ans. Pronounced McLane, same as the other.

Int. 10th. State whether or not you know of instances where defendant's pills have been substituted for or sent in mistake for those of plaintiff.

Ans. I do not know of their being purposely substituted, but I do know of instances where J. H. McLean's pills were sent in mistake, afterwards retur'ed, and the party ordering stated they did not want McLean's pills, but they wanted McLane's Liver Pills put up in Pittsburgh, by Fleming Bro's.

Int. 11th. State the resemblance, if any there be, between the pills of plaintiff and defendant, as shown in Exhibits A & B attached hereto.

Ans. Their general appearance are alike, particularly to those not experienced in handling patent medicines.

Int. 12th. Please take the boxes out of the labels or wrappers and see if you discover any resemblance.

Ans. I discover a very great resemblance, but the seal of one is blurred, and the seal of the other is quite distinct; the same oval pill-box, and the size and shape are the same.

Int. 13th. Look at box marked "C," with initials "P. A. H.;" "J.
210 H. B.," & "W. B. K.," referred to in depositions taken at Chicago and Pittsburgh, and made an exhibit with the depositions now being taken in this city, and state the resemblance, if any there be, to Exhibit A.

Ans. I see a great resemblance; more so than in Exhibit B. They are calculated to deceive anybody outside of the drug business.

Int. 14. Please give your opinion as a druggist whether the labels of defendant could be used to sell his pills as and for the pills of the plaintiff.

Ans. I think they could.

Int. 15th. State whether or not if there is a general resemblance between them.

Ans. There is.

Int. 16th. State whether the defendant's manner of putting up his pills, and the use of the labels thereon, is calculated to deceive any class of customers; and, if so, what class?

Ans. I think they are calculated to deceive persons who are not in the drug business, and even some who are in the drug business.

Int. 17th. State whether there is a substantial similarity between them.

Ans. I think there is.

Int. 18th. State whether or not, in your opinion as a dealer, the resemblance is such as to constitute an imitation.

211 (Objected to by defendant's counsel for this, that it is not within the provi'ce of witness to pass judgment herein.)

Ans. I think there is an imitation intended, in my opinion.

Int. 19th. Witness here shown boxes marked "E" with initials "W. A. H.," "F. H.," "C. G. J.," "J. H. B.," and "W. B. K.," and box marked "F" with initials "W. A. H.," "F. H.," "C. G. J.," "J. H. B.," and "W. B. K.," referred to in depositions in this case taken at St Louis, Cincinnati, Chicago, and Pittsburgh, and now attached hereto and made an exhibit with the several depositions taken in this city, and asked to state the resemblance, if any, between them.

Ans. I see a general resemblance of the two, particularly in the color of the wrapper, and a general appearance of both boxes.

Int. 20th. State whether or not defendant's red label is calculated to deceive or mislead customers and the public generally.

Ans. They are more likely to deceive the public than the other label: they are a closer imitation.

Int. 21st. If plaintiff and defendant were using the red label E & F and plaintiff should change to the dark label A, and thereafter defendant should change to his dark labels C & B, what inference would
212 you, as a dealer, draw from such change?

(Objected to by defendant's counsel on the ground that the inference, if any, was to be drawn by the court, and not by the witness.)

Ans. I would infer that the defendant was trying to imitate the wrapper of the Pittsburgh concern.

Int. 22d. Plaintiff having adopted the red seal as a distinctive feature in the manner of putting up his pills, and thereafter defendant having placed a red seal upon boxes of pills of his manufacture, what would this act indicate to your mind as a dealer?

(Objected to by defendant's counsel upon the same grounds as set forth in the preceding interrogatory.)

Ans. I would infer that the defendant was trying to get up his style of pills as much like the other as possible.

Int. 23d. Please state what your experience has been in selling the D'r C. McLane pills as to quantity, and what the demand is for them in the trade; whether or not it is increasing, and how they are classed?

Ans. My experience in selling C. McLane's pills is that they are the most popular patent medicine in the market. As far as my expe-
213 rience goes, both in the wholesale and retail drug business, is that they are at least fifty times more of McLane's pills sold than of McLean's. I do not remember of ever selling any of McLean's retail, and very few wholesale. I have noticed in our city papers an extensive advertisement of McLane's pills.

Cross-interrogatories:

Int. 1st. In what establishments have you served in this city?

Ans. In the house of James Syme & Co., wholesale and retail druggists, No. 139 Canal street, and afterwards to their successors, Frederickson & Harte, at the same place. For a short time, less than a year, at Maunsell & Bogel, wholesale druggists on Magazine street, between Gravier & Natchez streets, in this city. At present I am in the drug-brokers' business myself.

Int. 2d. At what place in Cincinnati were you employed in the drug business?

Ans. About five years in the house of Sime, Eckstein & Co., corner, then, of 4th and Main streets, Cincinnati, now S. E. Sime & Co., corner of 4th & Vine streets.

Int. 3d. Do you know of your own knowledge which of these pills were started first?

Ans. I think I do. As far as my recollection goes—it extends
214 back twenty years—the McLane's pills were the only pills of that name that I remember of. I distinctly remember that McLane's pills were put up and sold by Kidd & Co., druggists, corner of 4th and Wood streets, Pittsburgh, Pennsylvania, twenty years ago.

Int. 4th. Are not the dissimilarities in these pills in favor of the defendant, and that the defendant's pills as well known, and in equal demand, if not more so, than the plaintiff's?

Ans. The dissimilarities are not so great that they could not be mistaken the one for the other; defendant's pills are not as well known as the plaintiff's pills, and they are not in as great a demand.

Int. 5th. Are not defendant's pills more saleable in the market than plaintiff's pills?

Ans. They are not.

Int. 6th. Have you any personal or pecuniary interests in this matter?

Ans. None whatever.

J. H. Stockley—Deposition of.

Int. 1st. What is your name, age, and residence?

Ans. My name is J. H. Stockley; my age is forty-two; and my residence is corner of Felicity & Magazine streets, New Orleans.

Int. 2d. What is your business, how long, and where have you been engaged in it?

215 Ans. My business is that of a druggist. I have been engaged in it for 25 years, in the State of Louisiana.

Int. 3d. What is your experience in selling what are known as patent medicines—large or limited?

Ans. Extensive.

Int. 4th. Are you acquainted with Fleming & Bro's trade-mark used by them on pills made and sold by them?

(Witness shown box marked "Exhibit A," and accompanying these depositions:)

Ans. That is what I recognize as D'r C. McLane's Liver Pills.

Int. 5th. What is the reputation of these pills, and by what name are they bought and sold?

Ans. McLane's Liver Pills, and their reputation is very good.

Int. 6th. Are you acquainted with labels used by D'r J. H. McLean on pills made and sold by him?

(Witness shown Exhibit B attached to these depositions.)

Ans. What I have often sold as McLean's Universal Pills.

Int. 7th. How is the name of McLean ordinarily pronounced?

Ans. McLane, pronounced the same as McLane.

Int. 8th. State whether or not you know of defendant's pills having been sold as and for, or substituted in the place of those of the
216 plaintiff.

Ans. If a man would come into my store and ask for McLane's pills, whether I had McLane's or McLean's, I gave them without any distinction, unless they specially asked for McLean's Universal Liver Pills. In a retail way I sold both pills indiscriminately.

Int. 9th. Look at the boxes marked "Exhibits A & B," and state whether or not there is any general resemblance.

Ans. The resemblance is such that one could be readily sold for the other, except to experts.

Int. 10th. Please take the boxes out of the labels, and state whether you discover any resemblance between them.

Ans. Both have a similar seal and box, only the seal of D'r J. H. McLean is slightly blurred.

Int. 11th. Look at box marked "C," with initials "P. A. H.," "J. H. B." & "W. B. K.," referred to in depositions taken at Chicago and Pittsburgh, and state whether you find any resemblance to Exhibit A.

Ans. A marked similarity in the boxes.

Int. 12th. Please give your opinion as a dealer, whether defendant's labels could be used to sell his pills, as and for the pills of plaintiff.

Ans. Yes.

217 Int. 13. State whether or not there is a general resemblance between the labels of defendant and plaintiff; and, if yea, whether the resemblance is such as in your opinion shall constitute an imitation.

(Objected to by defendant's counsel that it is not within the province of witness to pass judgment herein.)

Ans. To regular druggists, not; to country dealers and consumers, yes.

Int. 14th. State whether or not there is a substantial similarity between them?

Ans. There is a marked similarity well calculated to deceive persons not well posted.

Int. 15th. Witness here shown boxes marked "E" & "F," referred to in the former depositions in this case, and now attached to the depositions taken in this city, and asked to state the resemblance, if any, between them.

Ans. There is a marked resemblance well calculated to deceive one not well posted.

Int. 16th. If plaintiff and defendant were using the red labels E & F, and plaintiff should change his labels to the dark label marked "Exhibit A," and thereafter defendant should change and adopt the dark labels marked "B" & "C," what inference would you as a dealer draw from such change?

218 (Objected to by defendant's counsel on the ground that the inference, if any, was to be drawn by the court, and not by the witness.)

Ans. That defendant evidently intended to copy plaintiff's labels.

Int. — Please state how you regard the pills of complainant, and give your experience as to the quantity sold in this section, and how they compare with pills manufactured by others.

Ans. I regard them as a good saleable pill. As to the quantity sold in this market, Wright's pills far outsell any other. McLane's pills sell very well, but as a druggist, I can dispose of a gross of Wright's pills to a dozen boxes of any other kind. There is little or no demand for McLean's pills.

Cross-examination:

1st cross int. Can you mention any special instances of your own knowledge, where McLean's pills have been sold for McLane's?

Ans. I cannot remember any special instances at the present time.

Cross-int. 2d. Do you know of any instances where McLean has authorized the sale of his pills for those of McLane's?

(Objected to by plaintiff's counsel.)

Ans. I do not.

219 Cross-int. 3d. Have you any personal or pecuniary interest in the success of this suit?

Ans. None whatever.

Thomas Kleinpeter—Deposition of.

Int. 1st. What is your name, age, and residence, and occupation?

Ans. My name is Thos. Kleinpeter; my age is 40 years; my occupation is that of a civil engineer; and my residence is at No. 129 Chartres street, New Orleans.

Int. 2nd. State whether you are acquainted with Dr. C. McLane's Pills, and, if so, whether you recognize the box, "Exhibit A," attached to these depositions, and now shown to you as being of that manufacture, and, if so, state your experience with regard to the use of these pills, and how you regard them.

Ans. I am acquainted with them, and have used them in large quantities with the railroad laborers. I, myself, personally have used them. They had the desired effect for which they are recommended. I always use them in preference to others.

Int. 3d. State whether or not, of your knowledge, there have been imitations of these pills in the market, or whether your attention has ever been called to an imitation, and, if yea, describe that imitation?

220 Ans. My attention has been called by druggists of my acquaintance to the fact that there was a pill in the market such as Exhibit B & C, now shown to me, by druggists frequently, and to guard against the use of them, deeming them such, I always avoided them, and had I not been so cautioned, I would have taken the imitation for the genuine.

Int. 4th. State whether or not in the use of McLane's Pills among the hands on your railroad, you have ever heard any complaints made in regard to the effects of these pills?

Ans. Never.

Cross-examination:

1st Cross-int. Are you related to the commissioner executing this commission, and, if so, state what that relationship is?

Ans. I am distantly related to the commissioner. My relationship is as far removed as the third or fourth degree, or what is known as the third or fourth cousin.

Cross-int. 2nd. How was it that you have been called upon to give this deposition?

Ans. Calling at the office of McGlom & Kleinpeter, att'ys at law, for the purpose of consulting them upon some points of law relating to business of my own, and observing the pills of McLane lying upon the table, and hearing the testimony of another witness relating to

221 them, and having been introduced to M'r Clarke, the attorney on behalf of plaintiff, said Clarke learning from me that I had been a consumer of said pills, he caused the commissioner to summon me to give my testimony on behalf of plaintiff.

Cross-int. 3d. Can you mention the names of any druggists, and their places of residence, who have called your attention to and warned you against the so called McLean's Pills?

Ans. Yes; James A. Lee, of New Iberia, Louisiana, and Claudius Mayo, of Opelousas, Louisiana.

Cross-int. 4th. How do you know that McLean's pills would not have the same effect as those of McLane's?

Ans. I do not know that they would have the same effect or would not, never having used them.

Cross-int. 5th. Are not the dissimilarities of these pills and the general manner of putting them up so great as to avoid any mistake of their being taken the one for the other?

Ans. No; one who is not a close observer would easily mistake the one for the other.

Cross-int. 6th. Do you know whether or not J. H. McLean has ever authorized the sale of his pills for those of C. McLane's?

(Objected to by plaintiff's counsel.)

222 Ans. I do not know.

Cross-int. 7th. Have you any personal or pecuniary interest in this matter?

Ans. None whatever.

Albert Norcom—Deposition of.

Int. 1st. What is your name, age, and residence?

Ans. My name is Albert Norcom: my age is 31 years. My residence is No. 139 Canal street, New Orleans.

Int. 2nd. What is your business? How long, and where, have you been engaged in it?

Ans. My business is that of a druggist. I have been engaged in it for about 13 or 14 years in this city and other places.

Int. 3rd. Are you familiar with the label or trade-mark used by Fleming Bro's, of Pittsburgh, upon the D'r C. McLane pill, and are you acquainted with the label used by D'r J. H. McLean upon pills made and sold by him? and, if yea, state the resemblance, if any there be, between them.

(Witness here shown boxes marked Exhibits A, B, & C, E, & F, and accompanying these depositions.)

Ans. I am acquainted with and have handled them for many years; have frequently seen McLean's pills sold for McLane's, and afterwards returned as not the pills desired, thinking that McLean's were an

223 imitation and not the pills they desired. The resemblance is very similar, and calculated to deceive a person not in the drug business.

Int. 4th. Please examine the boxes taken out of the wrapper, and see if you find any resemblance.

Ans. Yes; I find the box, the wax, size, and general appearance of the box the same, except on close inspection the seal on McLean's pills is somewhat obscure.

Int. 4th. State whether or not the pills of plaintiff and defendant are bought and sold by the same name.

Ans. Yes.

Int. 5th. How is the name of McLean ordinarily pronounced?

Ans. You will not find one out of twenty who will pronounce McLane or McLean differently.

Int. 6th. If plaintiff and defendant were using the red labels E & F, and plaintiff should change to the dark label A, and thereafter defendant should change to his dark labels B & C, what inference would you, as a dealer, draw from the fact of such change?

(Objected to by defendant's counsel that the inference, if any, was to be drawn by the court, and not by the witness.)

224 Ans. I should think he was trying to force his pills upon the public upon the reputation of plaintiff.

Int. 7th. If plaintiff, having adopted the use of a red seal as a distinctive feature, and thereafter defendant having placed a red seal upon boxes of pills of his manufacture, what would it indicate to your mind as a dealer?

(Objected to by defendant's counsel on the same grounds as the preceding objection.)

Ans. That he was trying to sell his pills upon plaintiff's reputation.

Int. 8th. What is the reputation of D'r C. McLane's pills, how do you you regard them, and what are their sale, large or limited?

Ans. Their sale is very extensive. Their reputation is very good. They stand second in sale. I have heard of no complaints in regard to their effects, but, on the contrary, I have heard a great many persons recommend them.

Cross-examination:

1st cross-int. Can you mention any special instances of your own knowledge where McLean's pills have been sold for those of McLane's?

Ans. I cannot remember at present of any special instance where they have been so sold. I have been until recently in the retail business, and in such instances where pills have so sold it was considered a mistake of the house, and not a design to impose upon the purchaser.

Cross-int. 2d. Do you know of any instance where McLean has authorized the sale of his pills for those of McLane's?

(Objected to by plaintiff's counsel.)

Ans. I do not.

Cross-int. 3rd. Have you any personal or pecuniary interest in this matter?

Ans. None at all.

Albert H. Clarke—Deposition of.

My name is Albert H. Clarke. My age is 46 years. I reside in Pennsylvania, and am an attorney at law.

On Friday, the 14th day of February, 1873, at the city of Mobile, Alabama, I called at the drug store of Soto & Pramo, corner of Royal & Dauphin streets, and whose card is hereto annexed and marked "Exhibit 1," and asked for a box of McLane's Liver Pills, and was given the box attached hereto and marked "Exhibit X," with initials "A. H. C." I demanded to know if the box given me was the genuine McLane's Liver pills, and was assured that they were the genuine McLane's Liver Pills, and they were sold to me as the genuine McLane's Liver
226 Pills. I then went to the store of Eugene P. Braun, druggist and apothecary, southwest corner of Dauphine & Joachim streets, Mobile, Alabama, and whose card is now attached hereto and marked "Exhibit 2," and asked for a box of McLane's Liver Pills, and was handed by a gentleman who claimed to be the proprietor the box of pills hereto attached and marked "Exhibit Y," with initials "A. H. C.," and, as in the previous case, I asked if they were the genuine McLane's Liver Pills, and was assured that they were, and as such they were sold to me. I then went to the store of L. D. & G. B. Gould, corner of Lawrence & Dauphine streets, Mobile, Alabama, and whose label is hereto attached and marked "Exhibit 3," and inquired for McLane's Liver Pills, and was handed the box of pills marked "Exhibit Z," with initials "A. H. C.," and attached hereto, which was also sold to me as the genuine McLane's Liver Pills. For each box so sold me I paid the sum of twenty-five cents.

Cross examination.

Int. 1st. What is your occupation or profession?

Ans. I am an attorney at law, and am now engaged on plaintiff' suit in this case, and reside at New Brighton, P'a.

Int. 2d. What is the particular branch in this case in which you were employed?

227 Ans. No particular branch. The case was placed in my hands entirely, to engage such counsel or make such changes as may seem to me proper, without any restriction. The attorneys of record, M. L. Gray and George Dennison, of S't Louis, Mo.

Int. 3d. Was not the particular branch in this case assigned or assumed by you to ferret out evidence on behalf of plaintiff?

Ans. I undertook to take a portion, and this was a portion of it.

Int. 4th. Have you within your own personal knowledge and according to law ascertained the fact of defendant authorizing the sale as, or substitution for his pills for, those of plaintiff's in this present investigation in this city?

Ans. I have not.

Tho's H. C. Allen—Deposition of.

Question 1st. Please state your name, age, and residence, and occupation.

Answer. Tho's H. C. Allen; age, 50 years; res., Cin'ti, O.; occupation, merchant in the firm of J. N. Harris & Co., being the resident partner.

Question. How long have you been engaged in business?

Answer. Twenty-five years in the medicine business.

228 Question. State what your experience is in selling patented or manufactured medicines, whether large or limited.

Answer. Quite large.

Question. State whether you are acquainted with D'r C. McLane's Liver Pills, as made and sold by the firm of Fleming Bro's, Pittsburgh, P'a, and whether you have dealt in them, and for how long.

Answer. I have known them ever since I have been in business. At one time we sold and handled many gross of them, buying them in 100 gross lots.

Question. Are you familiar with the label or trade-mark of said pills, as used by Fleming Bro's?

Answer. Yes, sir. They are generally known as "McLane's Liver Pills."

Question. What is the reputation of McLane's pills, as made and sold by Fleming Bro's, and the extent of their sales?

Answer. The reputation of their pills for many years has been very good, and their sales very large, but for the last two or three years I have known but little about them.

Question. What is that? (Witness was shown box of pills, marked "Ex. A.")

Answer. Box of McLane's genuine pills, as put up by Fleming Bro's.

229 Question. How is the name of McLean ordinarily pronounced?

Answer. McLane.

Question. Look at the boxes marked A & B, with labels thereon, and state the resemblance, if any, between them.

Answer. The resemblance is sufficient to deceive most people wanting McLane's pills.

Question. How do they compare, as regards size and form of package?

Answer. They seem to be about the same size & form; they are so much so that a person wanting either D'r J. H. McLean's or Dr. C. McLane's would be easily deceived by either box.

Question. State if any resemblance there be, as to color, style of lettering, and general appearance of labels.

Answer. Very much the same. Most people would be deceived without close inspection.

Question. Please open the packages, and state if there is any resemblance as regards the pill-boxes themselves.

Answer. The appearance of the boxes are the same. Both covers have a red seal on the top of the box. The boxes of both are about the same size & shape. On close inspection I find on the red seal the words, "McLane's Liver Pills;" on the other, "McLean, S't Louis."

230 Question. State whether there is any resemblance between Exhibits A and C.

Answer. The resemblance is very great. On inspecting the box, I find it would be more apt to deceive, as the words "Liver Pills" are more prominent than on Exhibit B.

Question. Give your opinion, as a dealer, whether the label of defendant could be used to sell his pills as and for the pills of plaintiff, Fleming.

Answer. I think they could be sold so largely among the country dealers, especially if the price was made a little less.

Question. State whether or not the defendant's manner of putting up his pills and the use of his label thereon are calculated to deceive any class of purchasers.

Answer. They would deceive a large of children and ignorant people who are sent to purchase such, knowing them only by the general reputation of "McLane's Pills."

Question. State whether or not they would be likely to deceive consumers generally.

Answer. I do not think the majority of consumers would stop to read, and when they opened them would discover no difference.

Question. State whether or not there is any substantial*ly* similarity between them.

231 Answer. The similarity is very great. I see a difference on close inspection.

Question. State whether or not they show a design to deceive.

Answer. They do.

Question. State whether or not the resemblance is such as to make it an imitation or similitation.

Answer. The general appearance is very similar.

(Witness shown packages marked E & F, with the initials thereon, "W. A. H." and "F. H.")

Question. State whether or not, by use of defendant's red label on boxes of pills like those used by plaintiff Fleming, defendant's article could be sold as and for the article of plaintiff.

Answer. They could.

Question. State whether they would deceive purchasers.

Answer. They would; mostly consumers.

Question. If plaintiff were using red label E and defendant red label F, referred to, and plaintiff should change his red label to Exhibit A, and thereafter defendant should change his red label to label B, what inference would you, as a dealer, draw from such change?

(Question objected to by def't's att'y.)

Answer. I should say that the change was made to sell his pills

232 upon the great reputation of the other—D'r C. McLane's.

Question. State whether D'r C. McLane's Liver Pills have been advertised extensively through the newspapers.

Answer. They have been, generally, and also through books, &c.

Question. State whether D'r J. H. McLean's pills have been extensively advertised through the newspapers.

Answer. Not, to my knowledge, much in the newspapers. He issued an almanac and some other books.

Question. State whether they are as extensively advertised as D'r C. McLane's pills.

Answer. They are not, and never have been to my knowledge. D'r C. McLane's pills were advertised and had large sales before I ever knew the others were being put up.

Sam'l B. Allen—Deposition of.

Question. State your name, age, and residence.

Answer. My name is Sam'l B. Allen; age, 55 years; residence, Glendale, O.

Question. What is your business, and how long have you been engaged in it?

Answer. Druggist, and have been engaged as such over twenty years, cor. Main & 3d streets, Cincinnati, O., as one of the firm of Allen and Co.

Question. M'r Allen, please state your experience in selling
233 patented or manufactured articles, whether large or limited.

(Question objected to by def't's att'y.)

Answer. Large.

Question. State whether you are acquainted with D'r C. McLane's liver pills as made and sold by the firm of Fleming Bro's, Pittsburg, and whether you have dealt in them, and for how long.

(Question objected to by defendant's att'y.)

Answer. I am acquainted with D'r Lane's Liver Pills made by Fleming Bro's. Have dealt in them for over twenty years.

Question. State what their reputation is; good or bad?

(Question objected to by defendant's attorney.)

Answer. From selling a large quantity of them for so many years, I judge their reputation is good.

Question. State whether you are familiar with the label upon these pills, as put up by Fleming Bro's.

(Question objected to by defendant's attorney, unless the label is produced and attached to these depositions for examination.)

Answer. I am familiar with it.

Question. By what name are they usually known, and bought and sold, among dealers and consumers?

(Question objected to by defendant's attorney.)

234 Answer. They are known, and bought and sold, by the name of McLane's Liver Pills, and generally McLane's pills.

Question. How is the name of McLean ordinarily pronounced?

(Question objected to by defendant's attorney.)

Answer. It is ordinarily pronounced the same as the name McLane is pronounced.

Question. Do you know the labels used by J. H. McLean on pills made and sold by him?

Answer. I do.

Question. By what name are they ordinarily bought and sold?

(Objected to by def't's att'y.)

Answer. By the name of McLane's pills; they are both pronounced the same way.

Question. Look at Exhibits A and B, and state the resemblance, if any, between them.

(Objected to by defendant's att'y.)

Answer. There is a general resemblance between them in color of letters, back-ground, curving of lines, number of lines.

Question. How as to the scroll?

Answer. They are similar in both cases.

Question. Please give your opinion as a dealer whether the labels of defendant could be used to sell his pills as and for the pills of plaintiff, Fleming.

235 (Objected to by def't's att'y.)

Answer. They might be if a person would not look at them close. A dealer might not be so easily deceived, because he would be likely to examine closely, but a consumer would be very easily deceived.

Question. State whether they show any design to deceive.

(Objected to by def't's att'y.)

Answer. I think the putting up a thing so near alike in external appearance to another is for the purpose of deceiving a purchaser.

Question. State whether there semblances are such as to make it an imitation.

(Objected to by def't's att'y.)

Answer. No; it is not an imitation; it is not a perfect imitation.

Question. State whether it is a similation.

(Objected to by def't's att'y.)

Answer. Yes; they similate each other in appearance.

Question. Look at the packages marked "E and F," with initials thereon, "W. A. H.," "F. H.," and "C. G. J.," and state the resemblance, if any there be, of one to the other.

(Objected to by def't's att'y.)

Answer. There is a resemblance in the general appearance in the color of the letters, the back-ground.

236 Question. State whether or not, by the use of defendant's red labels on boxes of pills like those used by plaintiff, Fleming, defendant's article could be sold as and for the article of plaintiff.

(Objected to by def't's attorney.)

Answer. It could be to a consumer; not so easily to a dealer.

Question. State whether they are calculated to deceive.

(Objected to by def't's att'y.)

Answer. I think they are.

Question. If plaintiff, by using red label E, and defendant red label F, referred to, and plaintiff should change his red label to A, and thereafter defendant should change his red label marked "F" to the label "B" and "C," what inference would you as a dealer draw from such a change?

(The defendant here demands that the exhibits here referred to in this question be attached and marked by the commissioner as the exhibits used in this question.)

Answer. I should infer that the defendant by so doing designed to keep up the similarity of the two articles, so that he could sell his on the reputation of the other.

Question. What is the extent of the sale of the plaintiff's pills with you?

237 Answer. I sold them a great many years, and always bought them a hundred gross at a time until recently. I do not buy as many now, in the last two years, at a time, because smaller lots are furnished me now at the same price.

Question. Is the sale of them as great now as two years ago?
Answer. I think about the same.

Cross-examination:

Question. How much did you pay for a hundred gross of these pills?
Answer. Twelve to fifteen dollars a gross.
Question. Did you ever know a man in the liver pill business named C. McLane?
Answer. I never knew such a man personally.
Question. Where did you hear he resided?
Answer. Near Pittsburg.
Question. Was he a doctor?
(Objected to by plaintiff's attorney.)
Answer. The extent of my knowledge is that I heard that there was a doctor at Pittsburg who put up these pills.
Question. Did M'r Fleming tell you so?
Answer. I cannot say.
Question. Is there such a firm existing now as Fleming Bro's, to your knowledge?
Answer. For a number of years Fleming Bro's have put up these pills.
238 Question. Have you any personal knowledge of who compose the firm?
Answer. Yes; I know both of them personally. I bought pills of them, and have seen them both in the city; and one of them has been engaged in the coal-oil business in Pittsburg.
Question. Do you know what these Pittsburg McLane pills are composed of?
(Objected to by plaintiff's attorney.)
Answer. I do not.
Question. Please examine the paper now shown you, Exhibit No. 1, and state what you know about that.
(Objected to by plaintiff's attorney.)
Answer. I believe these are the directions that go around the box of pills.
(Please hand it to the commissioner, and have it attached to the depositions.)

Re-examination:

Question. What do you pay for plaintiff's now?
Answer. I think fifteen dollars per gross.

William Gilliland—Deposition of.

Interrogatory 1. State your name, age, residence, and occupation.
Answer. My name is William Gilliland; my age is twenty-three years; I live in New Brighton, Beaver County, State of Penn-
239 sylvania; I am a druggist; I have been in that business for six years, all the time in New Brighton.
Int. 2. State whether you are acquainted with D'r C. McLane's pills, as made and sold by the firm of Fleming and Brothers, of Pittsburgh; and whether you have dealt in them, and for how long.
Answer. I am very well acquainted with those pills. I have dealt in them for six years, as long as I have been in business.
Int. 3. State whether you are familiar with Fleming and Brother's label or trade-marks used by them on pills made and sold by them.

(Witness shown box of pills marked "Exhibit A," and attached hereto.) And do you recognize Exhibit A as having their label?

Ans. I am familiar with their labels for pills, and the label on Exhibit A is one of the labels used by them.

Int. 4. What is the reputation of D'r C. McLane's pills, and by what name are they usually known and bought and sold among dealers and consumers?

Answer. They are known as good liver pills, and they are bought and sold as McLane's pills.

Int. 5. Do you know the label used by D'r J. H. McLean on pills made and sold by him? and, if so, look at box marked "Exhibit
240 B," "J. H. B.," hereto attached, and state whether it is one of his labels.

Ans. I am acquainted with his pills, and this is one of the labels used by him.

Int. 6. By what name are they bought and sold?

Ans. McLean's pills.

Int. 7. How is the name of McLean ordinarily pronounced?

Ans. The same way as that of McLane.

Int. 8. Have you ever bought and sold these pills made by J. H. McLean?

Ans. Yes, sir; I have.

Int. 9. Do you know of defendant's goods being sold as and for those of plaintiff?

Ans. Not directly so; but I often sell J. H. McLean's pills when customers call for McLane's pills without enquiring which McLane they mean.

Int. 10. State whether it is customary with you, when you are out of D'r C. McLane's pills, to sell the other when McLane's pills are called for?

Ans. Yes, sir; it is.

Int. 11. Look at boxes Exhibits A and B, and the labels thereon, and state the resemblance, if any, between them.

Ans. They are near the same size, and the labels are almost the same color; the general appearance is about the same.

241 Int. 12. Take the boxes out of the labels, and state whether you discover any resemblance.

Ans. The boxes are exceedingly alike, and the seals on the top are very much alike.

Int. 13. Look at box and label marked "Exhibit C," "P. A. H.," and also identified now by the initials of the commissioner, "J. H. B.," and state the resemblance, if any, to Exhibit A, "J. H. B."

Ans. It looks very much like, and the word "liver" is more prominent, and the scroll is similar to that on Exhibit A, "J. H. B."

Int. 14. Please give your opinion as a dealer whether these labels of defendant could be used to sell his pills as and for the pills of plaintiff.

Ans. I think they could.

Int. 15. State whether or not there is a general resemblance between the labels of plaintiff and defendant.

Ans. There undoubtedly is.

Int. 16. State whether defendant's manner of putting up his pills, and the use of the label thereon, is calculated to deceive any class of customers; and, if yea, what class?

Ans. Yes, sir; it will deceive a certain class of consumers.

242 Int. 17. State whether there is a substantial similarity between them or not.

Ans. Yes; I think there is.

Int. 18. State whether they show a design to deceive, and whether the resemblance is such as to make it an imitation of plaintiff's label.

Ans. I think they are intended to deceive, and I regard them as an imitation of plaintiff's label.

Int. 19. (Counsel now produce two boxes, marked respectively "E" and "F," and identified by the initials "F. H.," "C. G. J.," and "W. A. H.," and also now marked by the commissioner with the initials "J. H. B.," for the purpose of exhibiting them to the witness, and stating that the same cannot be attached to the present commission, because plaintiff has no other specimen, and desires to use the same elsewhere. The witness is requested to look at said Exhibits E and F and state the resemblance, if any, between them.)

Ans. The color and general appearance of the labels are the same.

Int. 20. State whether or not, by the use of defendant's red labels, and boxes of pills like those use' by plaintiff Fleming, defendant's article could be sold as and for the article of plaintiff, and whether calculated to deceive purchasers.

Ans. I think they could be sold that way, and are calculated to deceive almost any person.

243 Int. 22. If plaintiff and defendant were using the red labels E and F, and plaintiff should change to the dark label A, and thereafter defendant should change to dark label B or C, what inference would you as a dealer draw from such change by defendant?

Ans. I should think he was trying to imitate the plaintiff's?

Int. 22. Plaintiff's use of the red seal having become known, if, thereafter, defendant placed a similar red seal upon his boxes, as the same appear in Exhibits A and B, would such adoption and use of the red seal by defendant, in your opinion as a dealer, be calculated to deceive consumers?

Ans. Yes, sir; I think it would. The general appearance of the boxes, thus sealed, is so calculated.

A. G. Henry—Deposition of.

Int. 1. State your name, age, residence, and occupation.

Ans. My name is A. G. Henry; my age is forty-five years; I live in Kittan*g*ing, Armstrong County, State of Pennsylvania; my business is editor and publisher of a newspaper.

Int. 2. State whether you have at any time (been) a purchaser of McLane's Liver Pills from any dealer in Kittan'ing; and, if so, from whom and when.

244 Ans. I have at various times, within the last two years, purchased them from E. A. Brodhead, of Kittan'ing, a druggist.

Int. 3. For what purpose did you make these purchases?

Ans. For use in my family.

Int. 4. State whether, on any occasion, in purchasing McLane's pills, you found a different article had been furnished you than the one you were accustomed to purchase; and, if so, state the circumstances fully.

Ans. On one occasion I did. Some time, more than a year ago, within two years certainly, I went into Brodhead's drug-store, and asked for a box of McLane's pills, for the use of my wife. I got the pills; supposed, of course, they were the pills manufactured by Fleming Brothers; in fact I did not know at that time there were any others. I took them home, and my wife took the quantity as directed, and in a day or so she remarked that the pills did not seem to have the same effect that

they usually had. I then looked at the box and wrapper and discovered that they were a different pill altogether. They proved to be the pills of J. H. McLean, of S't Louis. I then called M'r Brodhead's at-
245 tention to this fact, and he said that he knew that they were not the Fleming Brothers' pills; that he had ordered McLane's pills of Kelly, a wholesale dealer in Pittsburgh, and supposed, of course, he would send him the pill manufactured by Fleming and Brothers; he had not designated which pill, and they sent him the S't Louis pill.

Int. 5. State when you purchased this box of pills of Brodhead, you observed anything in the appearance of the article that notified you that you were not getting the article you had asked for.

Ans. There was nothing in the appearance of the box or wrapper which led me to suppose that I was not getting the article I enquired for. I supposed I was getting the genuine McLane pills. I did not discover the difference till I made a more particular examination in consequence of my wife's remark.

Int. 6. You have stated that you purchased these pills for use in your family at different times; state whether you found their use beneficial, and such as encouraged you to continue the use of them.

Ans. I believe my wife would not take any other kind. She always insisted on having them. They were purchased for her use, and
246 she continued to use them from time to time, and preferred them to any other pill.

Edward Treanor—Deposition of.

Interrogatory 1. State your name, age, residence, and occupation.

Answer. My name is Edward Treanor; I am twenty-nine years of age; I live in the city of Pittsburgh, county of Allegheny, State of Pennsylvania; I am a druggist; I am in the drug-store of Joseph Fleming, of Pittsburgh.

Int. 2. Do you know the pill as manufactured and sold by Fleming Brothers, known as the McLane Liver Pills?

Ans. Yes, sir.

Int. 3. Look at Exhibit A, J. H. B., and state whether or not those are forms in which McLane's Liver Pills are put up and sold, as known to you.

Ans. The label or wrapper is the same as I have been accustomed to sell them. The oval wooden box, with the red wax seal, is the same as I have been used to selling them. I recognize these as the label and box made by Fleming Brothers, of this city.

Int. 4. Have you seen the Liver Pill as made and put by J. H. McLean, of S't Louis?

Ans. Yes, sir.

247 Int. 5. Look at Exhibit B, J. H. B., composed of wooden box and wrapper, and state whether you recognize these as the wrapper and box sold by J. H. McLean, of S't Louis.

Ans. Yes, sir.

Int. 6. State whether, in your opinion, the label and box of J. H. McLean, of S't Louis, resemble those of Fleming Brothers, and, if so, whether such resemblance is calculated to deceive ordinary purchasers.

Ans. They would deceive one-half of the purchasers without any trouble. We could sell them any day over the counter for C. McLane's pills. There is a strong resemblance in the color of the wrapper, in the form of the wooden box, and in the red seal on the top of the box. The

wrappers are as much alike as they could be without using the same wrapper.

Int. 7. Do you know personally of any instances where the pill of J. H. McLean, of S't Louis, has been delivered by mistake for that of Fleming Brothers?

Ans. Yes, sir. I think about May, 1871, J. B. Duncan, in the employ of Joseph Fleming, sold one dozen of J. H. McLean's pills, of S't Louis, instead of the C. McLane's pills, through mistake. C. McLane's
248 pills had been called for. The mistake occurred through resemblance between the wrappers of the pills. I was present when the mistake was made and discovered immediately afterwards.

C. Lincoln Williston—Deposition of.

Interrogatory 1. State your name, age, residence, and occupation.

Answer. My name is C. Lincoln Williston. I am twenty-nine years of age. I live in the city of Pittsburgh, county of Allegheny, and State of Pennsylvania. I am a druggist.

Int. 2. Do you know the C. McLane Liver Pills, as put up and sold by Fleming Brothers, of *of* this city?

Ans. I do.

Int. 3. Look at Exhibit A, J. H. B., composed of a label and box, and state whether you recognize them as the wrapper and box in which Fleming Brothers sell their pills.

Ans. I do.

Int. 4. Do you know the pill as put up and sold by J. H. McLean, of S't Louis, Missouri?

Ans. Yes, sir; I know them.

Int. 5. Look at Exhibit B, J. H. B., composed of paper wrapper and wooden box, and state whether you recognize them as the wrapper and box employed by J. H. McLean.

Ans. I do.

249 Int. 6. State whether or not there is, in your opinion, a resemblance between the wrapper and box as used by J. H. McLean, of S't Louis, to those used by Fleming Brothers, and whether such resemblance is calculated to deceive ordinary purchasers.

Ans. I think there is a great resemblance between them, and that they are calculated to deceive consumers.

Int. 7. Do you know any instance in which J. H. McLean's pills have been delivered for C. McLane's pills, which had been ordered?

Ans. I have known a case where a person ordered pills, spelling it as McLean, and when we sent J. H. McLean's pills to fill the order they have been returned, the purchaser saying he wanted the genuine McLane's pills. This occurred here in Pittsburgh, and I know of many such instances; they are of constant occurrence.

Int. 8. What house are you in?

Ans. In George A. Kelley & Co.'s wholesale house.

Int. 9. State whether, in your opinion, the presence in the market of J. H. McLean's pill, as the same is put up and sold, is, or is not, calculated to interfere with the sale of the pill as made and sold by Fleming Brothers.

Ans. I have no doubt that it is.

250 Int. 10. State whether or not, in your opinion, the demand for, and sale of, J. H. McLean's pills has been greatly promoted and occasioned by the advertising and reputation of C. McLane's pill, by Fleming Brothers.

Ans. I think they have been. I know so. Any person in the business of wholesaling these pills would say the same.

William H. Collins—Deposition of.

Q. State your name, age, and residence.

A. My name is William H. Collins. I am 40 years of age; and reside in S't Louis.

Q. State your business.

A. I am in the wholesale drug business.

Q. How long have you been in that business?

A. I was engaged from 1863 to 1871, inclusive, in the wholesale patent medicine business. I am now in the wholesale drug business.

Q. Where were you engaged?

A. In S't Louis.

Q. In what business were engaged before?

A. In the general drug business.

Q. Where?

A. In Illinois.

Q. For how long?

A. In Illinois and elsewhere?

Q. How long before 1863, altogether?

A. I have been engaged in the drug business since 1848.

251 Q. What kind of medicines have you sold in your engagements in the drug business?

A. Everything that comes under the head of medicines.

Q. What is the extent of your experience in selling what is called patent manufactured medicines?

A. I was very largely engaged in that special branch of business exclusively, for 8 y'rs.

Q. Have you sold such medicines at retail?

A. Our business here was mostly wholesale, but we have retailed also.

Q. State whether you are acquainted with D'r C. McLane's Liver Pills, as sold by the firm of Fleming Bro's?

A. I am intimately, by having sold them very largely for a number of years.

Q. State whether you are familiar with their label or trade-mark, as used in what are called D'r McLane's Liver Pills?

A. Yes, sir; I am perfectly familiar with it.

Q. Will you look at that and state what it is? (Hands witness a box of pills.)

A. That is a genuine box of McLane's Liver Pills.

Q. Made by whom?

A. Made by Fleming Brothers, of Pittsburgh.

(The above-mentioned box was marked "Exhibit A," and is attached to this deposition.)

252 Q. State whether that is the label used by them, and for how long, if you know how long?

A. It is the label that they have used, I believe, without variation for 10 or 12 years, and possibly longer.

Q By what or description are Fleming and Brothers' Liver Pills generally bought and sold or described?

A. They are more generally called for a' simply McLane's pills; sometimes they use the full title, saying "McLane's Liver Pills."

Q. When they are billed, when the bills are made out, how are they generally made?

(N. B.—Here the two last questions were objected to by the counsel for defendant.)

A. Our custom is to bill them as McLane's pills.

Q. Do you know what the custom is with dealers generally?

A. I believe that is the general custom.

Q. Do you know the label used by D'r J. H. McLean on the pills made and sold by him?

A. I am very well acquainted with it.

(A box of pills marked "Exhibit B," and attached to this deposition, was here shown to the witness.)

A. It is a box of pills such as are made and sold by D'r J. H. McLean, of S't Louis.

253 Q. Well, by what name are those bought and sold or described?

A. That is a difficult question. These are called McLane's pills also.

Q. How is the name pronounced generally?

A. I belive it is pronounced invariably McLane, the same as the Pittsburgh pill as before spoken of.

Q. M'r Collins, I will ask you to state what resemblance there is, if any, between those two labels on Exhibits A & B?

A. The general points of resemblance are in having dark background and white letters, and the resemblance in the arrangement of the lines.

Q. Well, as to the size and style or put?

A. The size and style of the wrapping are quite similar.

Q. And as to the color of the letters?

A. I mentioned that as the first point of resemblance. The labels having a dark background with white letters, and the general arrangement of the lines, I said.

Q. Well, as to the scroll upon which the name of the pills is?

A. That is a resemblance in the scroll containing the title of the pills, it being black, with white letters curved.

Q. Well, as to the general appearance?

254 A. I say that the general appearance is such that they might be mistaken for one another.

Q. By what class of purchasers?

A. Well, by consumers.

(Here two boxes of pills marked Exhibit C and D and attached to this deposition were shown to the witness.)

Q. State what they are.

A. Exhibit C is also a genuine box of McLane's Liver Pills, from Fleming Brothers, Pittsburg. This one marked "Exhibit D" is a box of McLean's pills as put up by J. H. McLean, of S't Louis.

Q. M'r Collins, I will ask you to open those two boxes of pills marked Exhibits C & D. State whether you discover any resemblance on the boxes.

A. Yes, sir; the two boxes are identical in point of size and shape, and further a red seal is on the cover of the two boxes.

Q. Any stamp on the seals?

A. Yes, sir; a red seal.

Q. What is the stamp on the seals?

A. On Exhibit C, McLane's Liver Pills; on Exhibit D, J. H. McLean, S't Louis. The principal point of resemblance is in the existence of any red seals at all. It is not usual on the top of pill-boxes.

255 Q. State whether Fleming Brothers advertise in any way of their using the red seal on the label of their pill-boxes?

A. I believe I have seen the red seal mentioned in their advertisements.

Q. Look at the label and see if there is anything in regard to it on their label.

A. Fleming Brothers say on their label——

(Here the above question was objected to by defendant's counsel.)

—" In future their name will be in red wax on each box ; " the name of the pill, McLane's name.

Q. How long have you been acquainted with McLane's pills as made and sold by Fleming Brothers ?

A. About fifteen years.

Q. When you first became acquainted with their pills, what label was then used ?

A. It had a red wrapper.

Q. Do you know how long that had been used by them ?

A. I do not.

Q. Do you about the time of the change when the red wrapper was changed from Exhibit A to C ?

A. I think about ten years ago.

256 Q. Give your opinion as a dealer, whether the label of defendant as shown by Exhibits B and D could be used to sell these pills for the pills of the plaintiff, Fleming.

A. I think they could very readily.

Q. Why do you think so ?

A. From the general similarity in the names and in the appearance of the goods of the two articles.

Q. Well, in anything else further ?

A. And from the further fact of their being put up in dozens in a very similar manner, and different from most other pills.

Q. As to the effect of the red seal on the boxes, the lid ?

A. That is not usually seen at the time the purchase is made. It is more calculated to mislead the consumer after the wrapper is off.

Q. Does it confirm any error, if he has committed one ?

A. Yes, sir.

Q. State whether you know of any instance in which defendant's pills have been sold for the plaintiff's.

A. What be more a matter of hearsay it ; wouldn't be evidence.

257 Q. State whether you have any actual knowledge of its being done, or heard parties say that it has been done by them.

(Objected by defendant's counsel.)

A. I can answer it if you want me to.

Q. State whether you have heard parties complain.

(Objected to by defendant's counsel.)

A. Yes, sir ; customers have complained to me that they have ordered McLane's pills, meaning Pittsburg McLane, and the others have been sent them. I have shown customers the two pills and they have taken the S't Louis pills, because they were cheaper, and I believe intended to sell them in place of the others.

Q. What is that belief founded upon ; why did you say you believed ?

(Objected to by defendant's counsel.)

A. I don't know that I have told you that he intended to sell them. It was my belief that he would sell them. I believe that they bought them on account of their being low-priced.

Q. What is your opinion, M'r Collins, as a dealer, as to the design of the defendant's label, whether it is designed to deceive any class of purchasers ?

(Objected to by defendant's counsel.)

A. My belief is, and always has been, that they were gotten up in resemblance of the Pittsburg pills.

Q. You speak of the label and wrapper, I suppose?

258 A. The general style or put up of the article is made to resemble this of the Pittsburg pills that sale might be obtained for them on the strength of the reputation of the Pittsburg article.

Q. Well, state whether the resemblance in the label or box, the form, size, and color, are calculated to deceive or impose upon any class of purchasers.

(Objected to by defendant's counsel.)

A. I think the resemblance is very strongly calculated to mislead the purchaser.

Q. State as to the probability of the purchaser being deceived where he sees one kind by itself, not having seen the two together to notice the difference, where he has not the two before him to compare.

A. A man comes into the store and calls for McLane's pills, meaning Fleming's pills. I think he would be more likely to be deceived if he had only the S't Louis J. H. McLean's pills than if he had the two together.

Q. When a consumer purchases, does he generally have the two exhibited to him at a time?

A. When he calls for McLane's pills, if he has nothing but his recollection to guide him he would not remember. It is not probable

259 that he sees but one, unless he asks to see the two different kinds. If a person asks me to show him McLane's pills, I will show him but one kind.

Q. State as to the probabilities of the purchaser detecting an error, if the defendant's article was handed him in place of the other, not having the two together to compare them.

A. I think that most purchasers, retail purchasers, if handed out McLean's pills, would readily take them for McLane's pill, of Pittsburg.

Q. What is the reason of that opinion?

A. From their close resemblance.

Q. State whether in your opinion that would be true with the ordinary mass of consumers?

A. I think it would.

Q. I will ask you, M'r Collins, to compare Exhibits B & D and state what they are.

A. Exhibit D bears a closer resemblance to Fleming Brothers' pills than Exhibit B does.

Q. In what particulars are those resemblances closer?

A. In the fact that the title line being almost identical, almost the same in appearance, as the title line upon Fleming Brothers' McLane pills.

Q. What do you mean by title line?

A. I mean the line containing the words "Liver Pills."

Q. The title line in Exhibit A—the words are what?

260 A. The words are "Celebrated Liver Pills," and on Exhibit B they are "Vegetable Liver Pills," and the lines follow the same curve with a black ground-work in the two exhibits A & B.

Q. Have you dealt in J. H. McLean's pills for some time?

A. Somewhat.

Q. Look at the box marked "Exhibit E," and state what it is.

A. Exhibit E is a box of pills, *is a box of pills*, originally put up and

used for some years by Fleming Brothers, Pittsburg, for their McLane's pills.

Q. Well, described in a general way the label.

A. Being white letters on a red ground-work.

Q. Did you ever deal in the article while they used that label?

A. I sold large quantities of them while they used this style of wrapping.

Q. Look at that box and label—(here Exhibit F is shown to witness, which is marked with the notary's own initials, "W. A. H.," but is not filed with these depositions)—state what Exhibit F is.

A. It is a box of pills, such as are put up and sold by Dr. McLean, of S't Louis, for some time, having a red wrapper similar to the
261 Fleming Brothers' McLane's pills with the red wrapper.

Q. Well, state whether the J. H. McLean's red wrapper bears a resemblance to the red wrapper of the Fleming Brothers, and point out the resemblance.

A. The main point of resemblance is in its being a red wrapper, and of its being put on in a similar manner and size.

Q. Well, as to the background, the color of the background?

A. The background is red with white letters. In this respect the resemblance between the two articles is quite marked.

Q. Well, as to the scroll, the form?

A. The general arrangement of the lines is very similar between the two articles.

Q. Well, state your opinion as to whether the defendant's article, with the label attached, could be used in selling his article as that of plaintiff?

A. It could be very readily.

Q. With what class of consumers; the general class of consumers?

A. Yes, sir; the general mass of purchasers.

Q. If plaintiff had been using a label such as Exhibit E, and the defendant had been using a label such as is on box marked "F,"
262 with the initials "W. A. H." therewith attached, and the plaintiff should change from his red label to Exhibit A, and after such change defendant should change from his red label to such a label as is marked "Exhibit B," what in your opinion would be the object of such a change on the part of the defendant?

(Objected to by defendant's counsel.)

A. I suppose his aim was, in a change, to keep up the resemblance between his pills and plaintiffs', that he might still be able to sell them on the strength of the reputation enjoyed by plaintiff' for their article.

Q. Were you acquainted with the defendant's pills while he used the red label?

A. I was.

Q. Can you state whether the change from his red label to the dark label with white letters was before or after Fleming Brothers' change from their red label to the dark label?

A. Afterwards. The defendant's change was made afterwards.

Q. Have you any knowledge as to how soon afterwards; do you know anything about that?

A. My recollection is that only a short time elapsed.

Q. In what manner did Fleming Bro's put up individual boxes;
263 whether they are packed in large boxes?

A. Twelve of them are put in a pasteboard box, and that box is wrapped with a coat of blue paper. Twelve *of* separate boxes of pills are put in a pasteboard box of a peculiar shape.

Q. In what shape?

A. Oblong shape. That box contains a dozen boxes of pills, and is wrapped in a coarse blue paper of a peculiar shade and color.

Q. Can you describe the color?

A. It is a dark grayish blue.

Q. Well, any label used on the boxes?

A. A label is used on the top of the boxes containing twelve boxes of pills.

(Here the testimony in regard to the large box was objected to by defendant's counsel.)

Q. State how J. H. McLean puts up the same boxes.

A. His are put up in a very similar manner.

Q. The same number of boxes put in a larger box?

A. Yes, sir; and the boxes have similar directions on similar boxes or wrappers.

Q. Well, any labels used on the boxes?

A. I am not positive of that, but my impression is that he does.

264 Q. M'r Collins, do you know the reputation which the Liver Pill made by Fleming Bros., the reputation which they bear?

A. Do I know the reputation they bear?

Q. Yes, sir.

A. Very well.

Q. State what that reputation is.

A. They stand very high in public esteem generally; higher, I think, than any other proprietary pill sold in this part of the country.

Q. Do you know of the extent of the sales of them; how extensively they are sold, I mean?

A. I believe there is hardly a town in the United States where they are not sold.

Q. As to the extent of them, that are sold?

A. That would be a conjecture.

Q. Whether large or small?

A. The quantity sold is a very large one indeed.

Q. I will ask you of the Western country, as to whether the sales are large or small?

A. I have spoken of the country at large.

Q. Yes, sir; I am speaking of the Western country.

A. The sales of them through the Western country are very large and have been for many years.

265 Q. Well, how are the sales of them compared with the sales of other pills in the Western country?

A. I believe them to be more extensively sold than any other one kind of pill.

Cross-examination:

Q. M'r Collins, you say that McLean's pills are generally called McLane's pills; are they not called D'r J. H. McLean's Universal Pills, or D'r J. H. McLean's pill?

A. Yes, sir; they sometimes order them in that way, as McLean's Universal Pill.

Q. Is it not a prominent feature in D'r McLean's pill?

A. Do you mean commonly known to the trade as the Universal Pill?

Q. Yes, sir.

A. I don't think it is a prominent feature.

Q. In looking at this box, is not the name "Universal Pill," there the most prominent thing on the box?

A. At the first glance, I should think that line would be the most apparent.

Q. The "Universal Pill," the most apparent at the first glance?

A. Yes, sir.

Q. You mean, upon a casual observation the "Universal Pill" would strike you at the first glance, the moment you say the box?

266 A. I think I would see it. I don't suppose it would be so with the general observer, the casual observer.

Q. Why not?

A. Because they don't look at the details.

Q. I am speaking of the name of the pills, not the general appearance?

A. I understand that; you are trying to get my ideas.

Q. I asked you if the name of that pill, upon looking at the pill-box, the name of "Universal Pill" wouldn't strike you quicker than any other.

A. You did not ask it in that way before.

Q. We were talking about the name of the pill.

A. I understand.

Q. I ask you that question, whether the name "Universal Pill," in the writing on the box, would not strike you more quickly than any other of the printed lines on the box?

A. I think it would.

(Exhibits A & B shown to witness.)

Q. Now, do you discover any similarity in the names upon the scrolls of those two boxes?

A. Any similarity in the letters of the name? it is not very close.

Q. Not very close similarity in the letters?

A. No, sir.

Q. Is there in the shape of the scroll?

267 A. The words themselves: the style of the letter is the same in both of them.

Q. In what respect the same?

A. The same form of letter used.

Q. How are they in size?

A. A little different in size.

Q. In what respect are they the same?

A. The same style of letter, identically, used; and if you will examine it you will bear me out, I think.

Q. The word "universal" is printed in a little larger letters than the "Celebrated Liver Pills"?

A. I have said once it was a little larger print.

Q. Isn't the words "Universal Pill" there a little more ornate?

A. Not at all, because the same tria'gular style of letter in either case is used. I speak now as printer. One has not as fine a finish as the other.

Q. One has not as fine a finish as the other?

A. No, sir. It was more cheaply done. The type was more worn.

Q. Now, as to the scroll, what similarity is there there?

A. The similarity is in being a plain back-ground with white letters.

Q. I mean, as to the curve?

268 A. The curve is different between Exhibit A and Exhibit B.

Q. Are not the words designating the name of the pills equally prominent in both?

A. I think they are.

Q. And easily read?

A. Easily read.

Q. Well, there would be no probability that a dealer in pills would be mistaken any more, would he, than a druggist?

A. Not when he would examine the pills side by side, which I think they rarely do.

Q. But it is an easy matter for them who know the pills?

A. Yes, but they very rarely examine them side by side.

Q. Would there be any possibility that you could be deceived in them?

A. No, I don't think it would be hardly possible, for we generally put the two together.

Q. If shown separate, could you be?

A. Not if I examine them; but I will say that the purchaser very rarely ever looks at each box of pills separately.

Q. He rarely looks at a box of pills?

A. Yes, sir; because it is usually enclosed in a package of pills.

Q. It is usually enclosed in a package of pills?

269 A. Yes, sir.

Q. Then how is the trade mark calculated to deceive?

A. I don't consider it well calculated to deceive a critic; but the ordinary average consumer is not a critic.

Q. Are all dealers critics?

A. Not all of them.

Q. All druggists are not critics?

A. I presume not.

Q. According to that the danger would be of being deceived by the similarity of names more than anything else; is not that the chief source of the difficulty?

A. The purchasing consumer would be very likely to be deceived by the similarity of names.

Q. (By plaintiff.) Do you mean the sound or print?

A. Both sound and printed.

Q. (By defense.) I did not ask you about the printed; I asked you about the names.

A. Well, I replied to it.

Q. Now, in looking at these two boxes, do you regard them as being exactly in size?

A. The boxes are the same in size; one being wrapped with a

270 little more care and skill than the other, has some less bulk than the other.

Q. From outward appearances, then, they would not be the same size?

A. So nearly of the same size as to be mistaken one for the other. The difference is not so great in that respect as to greatly undeceive.

Q. Is there, such a strong resemblance in the color, size, and appearances of these boxes as to cause them to be mistaken, one for the other?

A. I think there is.

Q. That is, between A & B, you think there is no doubt on that point?

A. No, sir.

Q. Now, on the body of this box, Exhibit A, there is a blue, private, internal-revenue-stamp?

A. Yes, sir.

Q. Is not that a marked difference from Exhibit B, so that a person could readily distinguish them apart—tell them apart?

(This question was objected to by pl'ff's counsel.)

A. I think it would.

Q. Does not this private revenue-stamp of Fleming Brothers appear on all their pills?

(Objected to by plaintiff's counsel.)

A. Yes, sir, I believe it does.

Q. Isn't it a very prominent feature on the wrapper of all of his boxes?

271 A. Somewhat so.

Q. Does it not contain his own name, the name of Fleming Brothers, or D'r McLane, so as to distinguish all boxes to which it belongs?

A. I think it does.

Q. Now, sir, on Exhibit A, which you hold, you observe the wording "wrapper and my name in red wax on each box," do you not?

A. I do.

Q. Do you see any reference whatever to red wax on Exhibit B, or to any wax on the boxes?

A. There is nothing said about red wax on the other wrapper, on the wrapper of Exhibit B.

Q. Well, sir, will you please explain how the use of a red seal on the inside box could sell the "Universal Pills" for "Celebrated Liver Pills"?

A. The seal on the box-covers of the two pills would not induce sales by it; but when boxes are kept for use in the household, the wrappers are generally missing, and it would be natural to distinguish the pill by the red seal.

Q. Is the red seal on the box calculated to deceive purchasers of pills?

A. If they were to open the boxes it would be very strongly calculated to do so.

Q. Do purchasers generally open the packages?

A. Not ordinarily until after the purchase is made.

272 Q. Well, can you tell me, to get at it more direct, by looking at Exhibit B, if the red seal on the box is calculated to deceive the purchaser, or calculated to induce the purchasers to buy that pill for D'r M'Lane's pill, of Pittsburgh?

A. I don't think it would, until they opened it.

Q. Do you discover any similarity in the reading on the two boxes—I mean, is Exhibit B a copy of Exhibit A, as to its reading; do you regard it as such?

A. Not a close copy. The similarity is the general arrangement of the lines and colors.

Q. Do you sell many of D'r J. H. M'Lean's Universal Pills—are you in the habit of selling them?

A. Comparitively a very small quantity as compared with others.

Q. I am not comparing them with anything; do you sell them?

A. Yes, sir.

Q. Do you receive many orders for them?

A. Not a great many.

Q. You receive some few, do you not?

A. Yes, sir.

Q. In what way are those orders generally given?

273 A. For McLean's pills.

Q. Isn't the word "Universal" sometimes used too?

A. Rarely, if ever.

Q. Well, you then purchase some from D'r J. H. McLean, have you not?

A. We have.

Q. How are they billed to you?

(Objected to by plaintiff's counsel.)

A. I see the bill so rarely that I can't say positively what he terms them.

Q. Now, sir, on Exhibits C & D, you say you see a closer resemblance than you do on Exhibits A & B; look at it again; do you think that it is closer?

A. I notice a closer resemblance between them.

Q. You are still of that opinion?

A. I still think so.

Q. Now, on Exhibit D are there not three prominent scrolls on the top of that box?

A. There are.

Q. Three prominent scrolls?

A. Yes, sir.

Q. Well, isn't the word "Universal" in a prominent scroll there?

A. It is.

Q. Are the words "Vegetable Pills" prominent in the same scroll?

274 A. They are.

Q. Are not the words "313 Chestnut street" in a prominent scroll?

A. They are.

Q. How many prominent scrolls do you observe on Exhibit C?

A. One.

Q. Only one? Are not D'r J. H. McLean's name, residence, and style of pill, prominent so any person could read the name, residence, name of pill, and the place of business?

A. They are so.

Q. They can be read by the most casual observer, can they not?

A. I think so.

Q. By anybody that can read and spell at all?

A. Yes, sir.

Q. Now, sir, outside of the scrolls where is there a similarity—where does it exist?

A. In the adoption of a scroll for the title of the pills, bearing a resemblance.

Q. I mean outside of the scrolls, in the background, through the lettering?

A. In the adoption of a dark background with white letters for the entire wrapper; that is an unusual style, except for McLane's pills.

Q. You mean that both use white ink with a dark background?

275 A. No, sir; there is no white ink there.

Q. Well, you mean both used black ink only. Is that what you mean?

A. I have put it in just as good shape as I could. I said a dark background, with white letters thereon.

Q. (By plaintiff.) Instead of using white ink with black paper, you use black ink with white paper?

A. Yes, sir.

Q. (By defense.) You see no particular difference between those two pills, from a close examination?

A. I do, upon an examination, see a difference, and have never failed to see a difference myself.

Q. Well, do you think there is any possible circumstance under which anybody would fail to see a difference?

A. I think a consumer would hardly observe the difference, unless he had two boxes of pills for comparing.

Q. In other words, you think a consumer would not examine very closely what he gets?

A. I think a consumer does not examine very closely, generally. He is apt to be governed by his confidence in the seller.

Q. Well, then, if there is any deception practiced, you think it
276 is generally done by the seller, do you?

A. I think the cheap retail dealer in these pills frequently takes advantage in the similarity in these names to sell one for the other.

Q. You state that as a general case, in fact is always the case?

A. I do not.

Q. You don't think the sellers are deceived, do you—men who know their business?

A. I think the retailer is often deceived.

Q. Will you observe on Exhibit C the same revenue-stamp, with Fleming Bro's' name, and name of pills?

A. Yes; as upon Exhibit A, I do.

Q. And that is also a prominent feature upon the box, is it not?

A. Yes; it is.

Q. Well, does D'r J. H. McLean, of S't Louis, advertise his medicines largely?

A. He does.

Q. His pills, also?

A. He does.

Q. Doesn't he send his advertisements all over the country?

A. I believe he does.

Q. Doesn't he rely upon his advertisements for the sale of his medicines, including his pills?

277 (Objected by plaintiff's counsel.)

A. I suppose he does.

Q. Has not D'r McLean been in business here for many years in these medicines?

A. He has.

Q. Dealing in proprietary medicines?

A. He has.

Q. Is he not known through the Western country as a large dealer?

A. I believe he is.

Q. Very generally known?

A. I think so.

Q. Do you know how long he has been doing business here—that kind of business?

A. I think about seventeen years.

Q. Well, his sales are generally throughout the West, are they not?

A. I believe they are.

Q. In all Western towns?

A. In the most of them.

Q. Consumers generally buy these boxes separately, do they not? By separat*ly* boxes, I mean small boxes.

Q. (By plaintiff.) What do you mean by "separately"?

A. (By defense.) I mean in small boxes; not put up in gross.

A. (By witness.) No. We used to retail from one to a half-dozen boxes at a time.

278 Q. They are never bought by the consumer, or rarely bought, by the dozen, are they?

A. Not generally; but sometimes.

Q. Well, you don't regard any deception is calculated as based upon the boxes in which the dozen are enclosed, do you?

A. I think the box containing the one dozen separate pill-boxes, with wrappings on the dozen boxes, is strongly calculated to mislead.

Q. Strongly calculated to mislead? Are they designed to mislead—any design in them to mislead at all?

A. It looks to me very much as though there was such a design.

Q. How are D'r J. H. McLean's pills put up?

A. As I have already described, twelve small, separate boxes of pills in a pasteboard box, and wrapped around with grayish-blue paper.

Q. Has he a label on his?

A. I am not certain.

Q. Don't you know that he has a brand or label of his house, his place of business, and everything of that sort, prominent on the box?

A. I have never seen any such brand.

Q. Do you know it is not on his boxes?

A. I do not know.

Q. Don't you know that he has got it on his boxes?

279 A. No, sir; I do not know that he has. If he has such a one, he has recently adopted it.

Q. Do you observe any similarity in the revenue-stamps, placed upon Exhibits A & B & C & D—A & B first?

A. Not a strong similarity.

Q. Do you observe any at all?

A. I do.

Q. In what are they similar?

A. In both bearing the words "United States internal revenue proprietary, one-cent stamp."

Q. Do you observe any in the color?

A. The colors are different.

Q. Do you observe any in the shape?

A. Not a close resemblance in the shape.

Q. Do you observe any in the style?

A. The styles are different.

Q. Are they calculated to deceive in any way?

(Plaintiff's counsel objects to all testimony in relation to revenue-stamps.)

Q. Do you regard the revenue-stamp upon Exhibit B as a copy, or designed to be a copy of Exhibit A?

(Objected to by plaintiff's counsel.)

A. I don't think it is.

Re-examination:

280 Q. Doesn't the size and general appearance in the lettering in the words "D'r J. H. McLean's," on Exhibit B, very closely resemble the words "D'r C. McLane's" on Exhibit A, as to the shape of the first line; or take the first line, the first words, as to the size of the lettering and style of lettering?

(Objected to by defendant, because there was no specific question of that kind in the cross-examination, and that it was all gone over in the examination-in-chief.)

A. They do resemble one another.

Q. Isn't the style of lettering the most prominent feature upon those two labels?

(Objected to by def't's counsel, as having all been gone over in the examination-in-chief.)

A. I think that this is what would be first looked at in reading the title.

Q. Isn't the same true of Exhibits C & D?

(Objected to by def't's counsel as having all been gone over in the examination-in-chief.)

Q. On Exhibits C & D state the resemblance in the words "Liver Pills" and "Universal Pills."

(Objected to for the same reasons given above.)

A. In their comparative prominence they are alike prominent in the two; the same style of lettering and similarity in the arrangement of the two labels.

Q. Take this question, considering the prominence given to the
281 red seal on the cover of the box by the plaintiff, on their wrapper and in their advertisements, wouldn't the absence of the red seal on removing the wrapper naturally excite suspicion of its genuineness in the minds of the consumers?

(Objected to by def't's counsel, as not growing out of the cross-examination.)

A. I think it would.

Q. If there were no red seal on the cover of the defendant's box, could it in your opinion be as readily substituted and vsed for the pills of the plaintiff?

(Objected to by def't's counsel as having been inquired into in the examination-in-chief, and not growing out of the cross-examination.)

A. I don't think it could.

Q. Do you think the difference of lettering in the impression on the red seal, as it appears on Exhibits C & D, would make any difference in that respect?

(Objected to by def't's counsel as not growing out of the cross-examination, but was inquired into in the examination-in-chief.)

A. Not a marked difference, because I think it is from the presence of the seal itself, more than the words, that would mislead.

Q. How is the name of the defendant ordinarily pronounced?
282 A. The pronunciation does not differ, in my experience or observation, from that giving the name of plaintiff's pills.

Q. Considering that the two names are pronounced alike, would it not be easier to deceive the purchaser than otherwise?

A. I think that it would be easier.

Q. Do you think the words "314 Chestnut street, S't Louis, Missouri," on the wrapper, would make any material difference in the matter of deceiving consumers, the other resemblances between the two wrappers being such as you have described?

A. Only to the consumer who would examine and compare the two articles closely.

Q. State what examination of the boxes would consumers, when buying, generally make—whether close or casual.

A. But casual, if any.

Q. State whether they read the labels closely, or inspect what is given them.

A. They seldom stop to read the title.

Q. What are they governed by, then, the general appearance?

A. They ask for McLane's pills and take what are given them, as a general thing.

Q. Well, what do you mean by that, that they take the general
283 appearance of the thing, or whether they go into details?

A. If they were to look at them they would be led by the general appearance.

Q. (By defense.) If they were to look at them, you say?

A. Yes, sir.

Augustus H. Webber—Deposition of.

Q. M'r Webber, state your age and residence.

A. I am thirty-four years of age, and I live in S't Louis.

Q. What is your business?

A. I am a wholesale druggist.

Q. Where?

A. No. 508 North Second street.

Q. Alone, or in a firm?

A. In a firm.

Q. What is the name of your firm?

A. Wengle, Blow & Co.

Q. How long have you been in the business of druggist?

A. I have been in the business over twenty years.

Q. Where; all the time in S't Louis?

A. All the time in S't Louis.

Q. State whether, in connection with your business, you have dealt in proprietary medicines to any extent.

A. Yes, sir; all that time I have.

284 Q. Are you acquainted with D'r C. McLane's Liver Pills?

A. Yes, sir.

Q. As an article of trade?

A. Yes, sir.

Q. Do you now deal in them?

A. Yes, sir.

Q. How long?

A. I remember them as long as I remember the drug-business.

Q. Do you know by whom they are manufactured?

A. Yes, sir.

Q. By whom are they manufactured?

A. Fleming Brothers.

Q. At what place?

A. Pittsburgh.

Q. Are you familiar with the label or wrapper of that wrapper?

A. Yes, sir.

Q. Have you dealt in D'r J. H. McLean's Universal Pills?

A. Yes, sir.

Q. Bought and sold them?

A. Yes, sir.

Q. For how long?

A. We haven't done much in them for the last four or five years.

Q. This is a package marked "Exhibit A," and is to be attached
285 to these depositions. I will ask you to look at it and state what it is.

A. It is a genuine McLane's pills.

Q. As made by whom?

A. As made by Fleming Bro's, of Pittsburgh.

Q. I will ask you to look at Exhibit B, and state, if you know, what that is.

A. Well, I am rather of the opinion, judging by the proprietary mark, that it is D'r J. H. McLean's.

Q. Are you familiar with these labels?

A. Yes, sir.

Q. Do you recognize them as labels of the articles which you have bought and sold?

A. Yes, sir.

Q. Well, compare them, and state if there are any points of resemblance between them; if so, state what they are.

A. Well, if I was not thoroughly posted in the business, in handling these goods minutely I would take the one for the other. I would not think there was much difference at a glance.

Q. In the general appearance?

A. In the general appearance they are alike. Unless they are closely scrutinized the one could be sold for the other.

Q. With what class of purchasers would they be likely to be sold one for the other?

A. The retailer and consumer could easily have these pills im-
286 posed upon them for the genuine Pittsburgh McLane.

Q. Why would that class of purchasers, do you think, be induced to buy D'r J. H. McLean's pills for the other?

A. Because they, in the first place, know that it was McLane's pills, and the next thing the resemblance of the pill to the original McLane. He would not say anything more, but suppose he was getting McLane's pills, the looks being alike.

Q. Well, state your observation as to the dealer; what kind of an examination or scrutiny a consumer makes in purchasing an article of that kind.

A. Well, my idea is that if a person wants a box of McLane's pills, he goes to the druggist and gets a box of pills; they are usually wrapped up; he takes them home, and that is the last of it. He is getting McLane's pills, and that is what he asked for.

Q. How is J. H. McLean generally pronounced?

A. McL-a-n-e.

Q. The two names are pronounced alike?

A. Yes, sir.

Q. By what name are J. H. McLean's pills bought & sold, known and described?

A. As McLane's pills.

Q. (By defense.) Which are you speaking of?

A. All of them. When we were asked for McLane's pills, until
287 this suit was began, we would simply say, McLane's pills—two dozen or one dozen.

Q. (By plaintiff.) Supposing you intended to buy Fleming's pills?

A. We would simply order McLane's pills.

Q. Do you know, as a dealer, which of these pills were first thrown upon the market, made, and sold?

A. Yes, sir; I remember that very well indeed: that is the Pittsburgh pill.

Q. State what reputation the Pittsburgh McLane's pills bear.

A. A very good reputation, perhaps one of best reputations of all pills, outselling all of them, so far as my recollection goes.

Q. The best recollection of anything of the kind that you know of?

A. Yes, sir.

Q. State how generally they have been sold during the time you have been in the business.

A. We have had orders for them from all quarters.

Q. That continued for how many years?

A. For a great many years since I have been in the business. We sell twenty gross a month now.

Q. As to the quantities of them that are sold, whether large or small?

288 A. Very large quantities.

Q. Please look at the labels of exhibits marked C & D of the covers, and also of the boxes marked C & D, and state as to those labels whether there is any resemblance between them?

A. Yes, they resemble each other fully as much as the others, if not more.

Q. What difference do you notice in the manner of marking of C & D?

A. I notice the first words "Universal Pills," and the other has "Vegetable Liver Pills" on the top. There seems to be more imitation than on the others to me.

Q. First in regard to the scroll?

A. Well, the scroll seems to be an imitation. There seems to be a particular or special attempt made to imitate the label in this one.

Q. Well, how in regard to size?

A. Well, in form they seem one way. They seem to try to imitate them as near as they could in a general form.

Q. Color, shade, and lettering?

A. In the shading and everything else—in the general style.

Q. Look at the boxes and see what resemblance, if any, you discover between them?

A. I don't discover any difference at a glance; everything seems to be alike.

289 Q. State as to the red seal, whether the' both appear on them or not?

A. The red seal appears on both, and then on a closer examination I find one has the name of D'r J. H. McLean, of S't Louis, and the other McLane's pills.

Q. State whether Fleming Bro's ever advertise their pills by referring to the red seal on the top of the box as one mark by which they identify their article.

A. I believe they used to. I am not positive about that, though I believe they used to refer to them.

Q. State whether you know if any other pills have that mark, the red seal upon the top of the box?

A. I do not know of any.

Q. Is it then a usual or unusual thing?

A. It is unusual.

Q. M'r Webber, I will ask you, as a dealer in proprietary medicines, whether any class of purchasers might be imposed upon—any person designing to purchase the Fleming article might be imposed upon with the other?

A. Yes, sir.

Q. If so, what class of purchasers?

A. Well, the consumer and the retail dealers, a great many.

290 For instance, of the retail dealers in the country, there is not one in a hundred that would know the difference; persons in the

city might possibly be able to tell, but as a general thing dealers in the country would not.

Q. From your observations where are such goods generally sold the most?

A. Generally in the country. There are persons in country stores who sell McLane's pills, and they don't know anything more about them than I do about diamonds. All they know is that they are McLane's pills.

Q. You state, then, that the resemblances are such as are calculated to deceive the ordinary class of purchasers?

A. I do.

Q. I will ask you if you were acquainted with the Fleming pill or label at the time they used their red label?

A. Yes, sir; I was acquainted with their red label bill.

Q. Will you look at that package? (Here witness was shown a full box of pills, the wrapper of which marked "E," and also with initials of the notary, "W. A. H.") State what that is?

A. That is a box of C. McLane's pills.

Q. Containing what kind of a wrapper?

A. Containing a red wrapper. This is the first McLane's pill that I knew of.

291 Q. Look at the box of pills, or wrapper, marked "F," with the notary's initials, "W. A. H.," and state what that is.

(Here a box of pills, marked "F," with the initials of the notary marked on the same, were shown to witness.)

A. Well, that is a box of D'r J. H. McLean's pills.

Q. Did you ever know the article called D'r J. H. McLean's pills with a red label or sold it?

A. I don't remember of having seen it.

Q. Well, look at these two, and state whether there are any resemblances, and, if so, what they are.

A. Yes, sir; the resemblances are even more than the previous boxes.

Q. They resemble, in the first place, how as to form and size?

A. They resemble as to color, size, and in the form of the name—the shape of the letters—the form in which they are gotten up.

Q. Well, look at the two sides in which there is printed matter and on the top, and say whether there is a resemblance running through—that is, the general appearance.

A. Yes; the general appearance is alike.

Q. Give your opinion, as a dealer, as to the probability of any class being deceived; any class of purchasers wanting C. McLane's pills being deceived by this package marked "F."

292 A. I don't think there would be much trouble in selling the package marked "F" for the package marked "E."

Q. To what class of purchasers?

A. To almost any retail class, except a few druggists.

Q. What examination do country dealers give to such matters; whether close or from general appearances?

A. No, sir, only from general appearances; and I doubt very much whether they look at them even. They go into a store and order a dozen of McLane's pills; they don't look at them; they don't scrutinize them.

Q. They expect to get what they order, I suppose?

A. Yes, sir.

Q. In other words, they are not on the lookout for imposition.

A. No, sir.

Q. Well, you consider the imitation on the J. H. McLean labe

there—you think that would be a source of substitution that would impose upon the mass of purchasers?

A. Yes; I think they could be disposed of in ninety-nine cases out of a hundred. I can sell these pills in ninety-nine cases out of a hundred, and they would stick.

Q. Do you know the kind of label Fleming Bro's used; do you
293 know whether they have made any change in the last month in their wrapper?

A. Not that I have noticed.

Q. Do you remember the time that Fleming Bro's from the red label to the label they now use?

A. No, sir; I do not remember the exact date.

Q. Have you any recollection whether it was made a few or many years ago?

A. Yes; it was some time ago.

Q. Assuming that Fleming Bro's changed from their red label referred , marked "E," to the label marked "A," and that D'r J. H. McLean, up to that time, had been using the red label marked "F," then, if D'r J. H. McLean thereafter changed to Exhibit B, what would such a change indicate?

(Objected to by defendant's counsel as not stating facts, but the opinion of the witness.)

A. I think it would indicate an imitation of C. McLane.

Q. State what construction dealers in the article would put upon such a change.

(Objected to by counsel for def't.)

A. They would place the same construction. It would be an imitation or counterfeit.

Cross-examination:

Q. That is, you suppose they would?

294 A. No, sir; I would not suppose them to. I know they would.

Q. M'r Webber, in this Exhibit B, ain't the words "McLean's Universal Pills" prominent words on the box?

A. Yes, sir.

Q. If persons could read at all, they could read that?

A. Yes, sir.

Q. "D'r J. H. McLean"—isn't that plain and easily read?

A. Well, yes: it is plain.

Q. And easily read?

A. Yes, sir.

Q. Any person by ordinary scrutiny could easily tell them apart?

A. No, sir; not by ordinary scrutiny, I don't think they could.

Q. Any person who knows how to read at all can easily tell them?

A. Yes sir.

Q. Now, on Exhibit A, do you observe a revenue-stamp, and isn't that a marked feature on this box?

A. Yes, sir.

Q. Isn't it a distinguishing feature?

A. Yes, sir; it is.

Q. Well, do you notice any great difference between that stamp and the stamp on Exhibit B?

295 A. Yes; I notice this difference: that one covers the entire side of the box, whilst the other covers only a part.

Q. B only covers a part?

A. Yes, sir.

Q. B is an ordinary revenue-stamp?
A. As to its size.
Q. As to its size and color?
A. Yes, sir.
Q. And *the* has a different color and is a private stamp?
A. Yes; they are both proprietary stamps; one is small and the other is large.
Q. It would be noticed by the most casual observer, wouldn't it?
A. If he were to closely examine it, but at a glance he would not.
Q. State if the resemblance between those two revenue-stamps, as close as it is, is as calculated to deceive as anything else on the box.
(Plaintiff's counsel to all testimony touching revenue-stamps.)
Q. Now, I want you to look at the words on these two boxes and see if the same words are on each box.
A. No, sir; the reading is different.
Q. Do you notice on Exhibit B any reference to any seal on
296 the box? I am comparing now A & B.
A. No, sir; I don't find any reference to the seal on Exhibit B.
Q. Do you see any on D?
A. No, sir.
Q. Well, do purchasers ever open boxes when they buy them?
A. No, sir; that is, dealers; consumers do.
Q. Consumers open them when they take them, I suppose?
A. Yes, sir.
Q. When they buy them from the retail dealers, do they open them and look at them?
A. No, sir; I believe not.
Q. Well, how is this seal on these boxes—this red seal—calculated to deceive?
A. It would be. For instance, you buy a box of McLane's pills, and did not notice the name, and this seal and name were on another box, and being the same, they are very apt to suppose it was the same kind.
Q. If they were to read it, would they?
A. Yes, sir.
Q. The presence of the red seal on D'r J. H. McLean's pills, would it lead a person to try them?
A. If it is a distinctive feature of D'r J. H. McLean's pills, I think it would be apt to lead them to buy them.
297 Q. Well, do they ever look at them before buying them?
A. No; they never look at them; not if they buy them from the wholesale druggist. I suppose they might if bought from the retail dealer.
Q. If they never look at it, how is it calculated to deceive them?
A. For instance, if they go to a store to buy a box of McLean's pills, and some one hands out a box of J. H. McLean's pills, and if they go home and tear off the wrapper, a casual observer would not look at it; he would suppose it was all right, because there is the seal, and it is all right.
Q. Wouldn't they suppose it was all right now whether they saw the red seal or not?
A. They might, yes, and they might not.
Q. You stated in your direct examination that consumers hardly look at them enough to know the difference.
A. In the country, I suppose, they don't know the difference; that is, a great many of them.
Q. How long have you known D'r J. H. McLean?

A. I have known him for twenty years.
Q. What is his business?
A. The patent-medicine business.
Q. During the entire time?
298 A. Yes, sir.
Q. Has he advertised his business largely?
A. Well, I don't remember that he did any advertising until, during the war, he commenced his almanac.
Q. Don't you know he advertised very largely?
A. No, sir; I do not; only what I told you about his almanacs.
Q. Do you deal in his medicines?
A. Yes, sir.
Q. Are not his medicines very generally known throughout the country?
A. Yes; they are generally known so far as our trade extends.
Q. His place of business, and everything connected with it, is conspicuously advertised, is it not?
A. Yes, sir.
Q. Now take Exhibits C & D. On Exhibit D you observe three separate scrolls, do you not?
A. Well, you mean curves, here.
Yes, sir.
A. Two or three heavy black scrolls.
Q. Isn't that a distinctive feature on Exhibit D?
A. No, sir; I think the distinctive feature in these two top scrolls is the words "Vegetable Liver Pills."
Q. Isn't the word "Universal" equally distinctive?
299 A. No, sir; not so much as the words "Liver Pills."
Q. Well, are they not of the same size?
A. Yes, the letters are about the same size.
Q. And easily read, I presume?
A. Yes, sir.
Q. Well, "Dr J. H. McLean," isn't that plain and easily read, on there, also?
A. Yes, sir.
Q. Well, now, don't you observe that Exhibit D is a much darker box than Exhibit C?
A. The ground-work is darker.
Q. Darker and heavier, isn't it?
A. Yes, sir.
Q. Do you notice then that Dr J. H. McLean's place of business is conspicuously advertised?
A. Yes, sir.
Q. So that any person wishing to read it would have no difficulty in doing so?
A. I don't think they would
Q. And so with this medicine?
A. No, sir.
Q. Well, does the same difference exist in the revenue stamps on Exhibits C & D that are on A & B?
A. Yes, sir.
Q. On C the revenue stamp is a distinguishing feature, is it not?
300 A. Yes, sir.
Q. Well, now, you stated in your direct examination that both names being alike, one would take the pills and think it was all right.

Now, isn't it principally the name which causes them to mistake one pill for the other?

A. Yes, it is.

Q. You stated that the scroll on Exhibit D seemed to be a special effort to imitate the scroll on Exhibit C?

A. Yes, sir.

Q. Now, there are three scrolls on D, would that lead to any such opinion; wouldn't that seem rather an intention to distinguish it from C?

A. No, sir; I think that would probably be put in for effect, so as to make it different, or try to make it different.

Q. You think the three scrolls would be apt to be put in for effect?

A. Yes, sir. The general appearance, at a glance, they look alike, but upon close observation, of course, there is a difference.

Q. You stated the color and shading were alike. In what are they alike?

A. It seems to be the same kind of work, & the same style of lettering; in other words, it is very much like two peas, only a little
301 different in size and shape, perhaps, but like two peas.

Q. Don't you observe that on one the lines are heavy and dark, and on the other the lines are almost white?

A. I observe that on examination, yes, sir.

Q. Couldn't you see it ten rods off?

A. No, sir; not very well. I could not tell which was which that far off.

Q. Can you tell a brick house from a stone house, across the road?

A. I think I could.

Q. Now, sir, I wish to ask you about E & F. Is not the reading there different on E & F?

A. Well, they seem to be alike in reading, except that E is worded "D'r McLane's Celebrated Liver Pills; in sick headache, and in all bilious complaints surpassed by none;" whilst F has "D'r McLean's Universal Pills, for the cure of headache, bilious diseases, &c."

Q. That is a close resemblance in the reading?

A. They seem to be the same, except the words "Universal Pills."

Q. Do you regard that imitation as close as any other you observe on the pills?

A. Closer.

Q. Closer than any other you have observed?

A. Yes, sir.

302 Q. Well, is not D'r J. H. McLean's place of business conspicuously attached to his boxes?

A. Yes, sir.

Q. And place of manufacturing the pill?

A. Yes, sir.

Q. They can be easily read, can they not?

A. Yes, sir.

Q. I notice on this pill box, Exhibit F, German reading there, does that occur on the other?

A. No, sir.

Q. Isn't that a distinguishing feature?

A. Yes, when you read it; but that is the first, this time, that I discovered it.

Q. Is there such a strong resemblance between German and English that it can not be detected?

A. Yes, but it don't happen to be in German. They are English let-

ters, but German words. I never noticed that until just this minute. I thought it was some English reading matter there?

Q. Did you ever receive any orders from the country for D'r J. H. McLean's pills?

A. We have recently, within the last three or four months, but before that we did not.

Q. Do you receive them now?

A. We receive some, not a great deal.

Q. Since the institution of this suit?

303 A. Yes, sir.

Q. You say that retail dealers never look at anything, but take just what you give to them.

A. No, sir; I say the general dealers.

Q. You said that almost the entire retail dealers did not look at any of them.

A. No, sir; I don't think I said the retail dealers. If I did, I didn't mean so. I said the general dealers in the country, who are the largest purchasers of patent medicines, don't know the difference, there is such a close resemblance. They ask for a patent medicine of a certain name, and expect to get what they call for, and don't examine or scrutinize it.

Q. When retail dealers send orders to your house for certain medicines, and you have not got it in your house, don't you substitute other medicines in the place of it?

A. No, sir; we go out and get it for them.

Q. You never substitute any of your own goods to fill orders from the country, when you haven't the goods ordered?

A. No, sir; except the person ordering the goods agrees to it. We lay down the Golden Rule in our house that "the goods ordered are the goods wanted."

304 Re-examination:

Q. M'r Webber, upon examining Exhibits A & B, and C & D, and E & F, state your opinion as to whether the resemblances you observe there are accidental?

(Objected to by def't's counsel as not growing out of the cross-examination, and having been fully brought out by M'r Gray in the examination-in-chief.)

Q. Compare each of them, A & B, &c.

A. No, sir; I should think it was not accidental but intentional.

Q. In the absence of such resemblances, state your opinion, if one pill put up as shown by the exhibits, could be substituted for the other, solely upon the similarity of the names, provided the labels were entirely distinguishable in their character?

A. No, sir; they could not.

Q. In regard to the advertisement of these medicines, what proportion, if you know, of the advertisement done by D'r J. H. McLean has been specifically in regard to these pills?

A. I don't remember of seeing his pills advertised at all.

The defendant, to sustain the issue on his part, offered the following evidence, to wit:

305 DEF'T'S EVIDENCE.

William G. Taylor—Deposition of.

My name is William G. Taylor. I am twenty-nine years of age. I reside in the city of S't Louis, and am traveling-agent for James H.

McLean, the defendant in this suit, and have been since 1869. I am traveling-agent for the sale of James H. McLean's Family Medicines. I was in the employ of D'r McLean about two years before I commenced to travel for him. I have sold D'r McLean's Strengthening Cordial Blood Purifier, D'r McLean's Volcanic Oil Liniment, D'r McLean's Chinoidine Sugar Pills, D'r McLean's Universal Pills, and D'r McLean's Candy Vermifuge. I have heard of D'r C. McLane's Liver Pills. I have seen the pill-boxes and the labels on the boxes of these last-named pills. These pills purport to be from Pittsburg, Penn'a.

Q. What name appears on the labels and boxes of "D'r C. McLane's Liver Pills"?

(Objected to by counsel for complainant, as the boxes, &c., are the best evidence.)

A. The name of Fleming Bro's, Pittsburg, Penn.

Q. Have you ever seen the labels of D'r C. McLane's "Celebrated Liver Pills"?

A. I have.

(Defendant's attorney exhibits to witness a printed label, and asks him—)

Q. Have you ever seen this label before?

306 A. I have.

Q. What label is it? State particularly.

(Objected by complainant's counsel unless label is attached and made a part of deposition.)

A. This is the label of D'r C. McLane's "Celebrated Liver Pills," prepared only Fleming Bro's, No. 60 Wood street, Pittsburg, Penn. (Said label is hereto attached and marked "Exhibit A".)

Q. Are you familiar with the labels of D'r James H. McLean's Universal Pills?

A. I am.

Q. Have you one or more of them now in your hand?

A. Yes, sir; I have one.

Q. Will you annex it to your deposition as Exhibit B? (Label is annexed hereto and marked "Exhibit B".)

Q. Is it possible for any one who can read to mistake the labels of D'r J. H. McLean, 314 Chestnut street, S't Louis, Mo., for the label of D'r C. McLane, 60 Wood street, Pittsburg, Penn., prepared only by Fleming Bro's?

(Objected to by complainant's counsel as leading.)

A. I think not.

Q. Is there any such resemblance between the said labels, or the pill-box with the labels on them, as to deceive a person who could not read or write?

307 (Objected to by complainant's counsel as leading.)

A. I think not, for the reason that the stamps are entirely different, both in color and appearance; also from a difference in the general color and appearance of the labels; also from the fact that the stamp on D'r C. McLane's label is totally unlike the stamp on D'r J. H. McLean's label in size, appearance, and color.

Q. In all your experience as agent for the sale of these pills, have you ever known any persons to mistake D'r C. McLane's "Celebrated Liver Pills" for D'r James H. McLean's "Universal Pills", or vice versa.

(Objected to by complainant's counsel as leading and immaterial.)

A. I have not; not to my knowledge.

Q. Have you ever been deceived in regard to that matter?

(Objected to, as above.)

A. No, sir; I have not.

Q. Do you know whether D'r C. McLane, of Pittsburg, Penn., or Fleming Bro's for D'r McLane, have made any changes in their label since 1869 for said "Celebrated Pills"?

A. They have once since my knowledge.

Q. State fully in what respect the label has been changed, and if it resembles any other label, and if so, what one?

308 A. I should say that it has been changed to resemble very nearly the label of D'r J. H. McLean, of S't Louis, as to general appearance. (Objected to by counsel unless label is produced.) My attention was first called to this change in the label by a dealer whose name I can now recollect, but who lives in my district. (All of witness' answer objected to by complainant's counsel, as immaterial and not raised by the pleadings. The label spoken of is here produced and shown witness, who identifies it as the label referred to by him, and said label is hereto attached and marked "Exhibit C".)

Q. Are you able to state whether or not the sales of D'r James H. McLane's "Universal Pills" have increased or diminished since the first day of June, 1872?

(Objected to, as immaterial and irrelevant, by complainant's counsel.)

A. I am able to state. I should say that they have increased in my district or territory about one hundred per cent. My territory extends over the northern portion of the State of Missouri, the whole of the State of Iowa, portions of northern Illinois and southern Wisconsin; also the southern part of Minnesota and the eastern portion of Nebraska.

309 Q. Do you know anything concerning the letters and advertisements that were used by D'r James H. McLean, of S't Louis, and by his traveling agents, in making sales of his "Universal Pills"; if so, state particularly what you know of them.

(Objected to by complainant as immaterial & irrelevant.)

A. I know that these I have in my are a portion of the letters and advertisements used; I have used them, (and these I herewith file as exhibits to my said deposition, marked Exhibits D, 1, 2, 3, & 4). D'r James A. McLean also advertised by an almanac, and a small pamphlet called the "Language of Flowers, or Floral Hand-Book." Exhibits D 3 & D 4, go around each of D'r James H. McLean's Universal Pill-boxes. Exhibit D 3, was formally used, but D 4 is now used, and has been for some time past.

Q. How many almanacs does D'r J. H. McLean publish annually, with an advertisement of his "Universal Pills"?

(Objected to by complainant's counsel as irrelevant and immaterial.)

A. I do not know.

Q. Are these the almanacs for 1870, 1871, & 1872, and in what language are printed?

A. Yes, sir; they are, and they are printed in the English language. (Said almanacs are hereto attached, and marked Exhibits E, 1, 2, & 3.)

310 Q. In how many languages are these almanacs printed?

(Objected to by counsel as immaterial and irrelevant.)

A. They are published in seven different languages; they are published in the English, French, Spanish, Bohemian, Swedish, Norwegian, and German languages.

Q. Do you know whether these almanacs are circulated over all parts of the territory over which you travel?

(Objected to as irrelevant and incompetent.)

A. I do know that they are thoroughly circulated over all parts of my territory.

Q. Examine this envelope, and state what you know about it, and its circulation?

(Objected to by complainant's counsel.)

A. I have distributed over numerous portions of my territory, nearly one million of these envelopes. The envelopes that I distributed were exactly the same as this one, with the exception that they did not have the address of "D'r J. H. McLean, No. 314 Chestnut , S't Louis, Mo.," printed on the face. The envelopes distributed by me were perfectly plain, unless I had the name of the dealer, to whom I gave them, printed on the end or corner as a business card, or advertisement for him. (Said envelope is hereto attached, and marked "Exhibit F".)

311 Q. Are you able to state whether or not, D'r James H. McLean's "Universal Pills", have, or have not proved efficacious and satisfactory throughout the district over which you traveled agent for said McLean?

(Objected to by complainant's counsel as irrelevant and incompetent.)

A. They have been most satisfactorily received—they have given general satisfaction everywhere.

Q. Have you ever come into competition with D'r C. McLane's "Celebrated Liver Pills" at any place within your district; and, if so, what has been the effect of that competition?

(Objected to by complainant's counsel as being irrelevant and incompetent.)

A. I have, but really I do not know that I clearly understand your question, M'r Hill.

Q. State, as far as you know, whether the sales of either pill were more or less.

(Objected to by complainant's counsel for reasons above stated.)

A. When I first commenced travelling for D'r McLean I found a good many of the dealers were selling D'r C. McLane's "Celebrated Liver Pills," manufactured by Fleming Bro's, Pittsburg, Penn., under the impression that they were made by D'r J. H. McLean, manufacturer of the "Strengthening Cordial & Blood Purifier," and "Volcanic Oil Liniment", &c.

312 Q. Why did they think that D'r J. H. McLean manufactured D'r C. McLean's pills at Pittsburg, and did you ever discover the error; and, if so, when?

(Objected to by complainant's counsel as being irrelevant and incompetent.)

A. They, the dealers, gave me as explanation the reason why they were selling D'r C. McLane's "Celebrated Liver Pills" was because in ordering them from the large dealers or jobbing houses, in original packages, they would invariably send the D'r C. McLane's "Celebrated Liver Pills" in place of "D'r J. H. McLean's Universal Pills."

Q. Go on and explain the whole matter.

(Objected to by counsel for complainant for reasons above stated.)

A. And they told me, in several instances, that they had returned the same packages of the D'r C. McLane's "Celebrated Liver Pills" back to the large dealers or jobbing houses as high as three times before they could get a package of D'r J. H. McLean's; "Universal Pills" was what they originally wanted; and this having occurred so often, that they very often retained the package of C. McLane's "Celebrated Liver Pills"; and they further told me that they supposed we were loosing

thousands of dollars every year on that account; by "we," I mean D'r J. H. McLean, of S't Louis, Mo.

313 (Answer objected to as being immaterial & irrelevant, and not responsive to the question, and as being hearsay.)

Q. Since the first of June, 1872, has there been any further difficulty in regard to the sale of the "Universal Pills" of D'r James H. McLean, of S't Louis, as to competition between his "Universal Pills" and the "Celebrated Liver Pills" of D'r C. McLane, of Pittsburg, Penn.?

(Objected to by complainant's counsel as being irrelevant, &c., and as being leading.)

A. I think there has, caused by the similar appearance of the wrapper, on account of the change made in the C. McLane "Celebrated Liver Pills," so as to resemble the wrapper of the James H. McLean "Universal Pill."

Q. When was that change made by C. McLane, or by Fleming Bro's?

A. It was called to my attention. I first noticed it about the latter part of August, or the first of September, 1872.

Q. What effect had that change upon the sale of the pills?

(Objected to by complainant's counsel for reasons above stated.)

A. Well, I should say he deprived us—D'r James H. McLean I mean—of a large portion of the legitimate results of advertising, and

314 of the sales *of* which I think D'r J. H. McLean was entitled to.

Cross-examination:

Q. M'r Taylor, how old are you?

A. About twenty-eight or nine; I am not certain which.

Q. What business were you in before you went into the employ of D'r James H. McLean?

A. In the post-office department, at Memphis, Tennessee.

Q. How long had you been there?

A. About two or three years, I think.

Q. Were you ever in the drug business?

A. No, sir.

Q. How were you employed while you were in D'r James H. McLean's office, before you commenced traveling for him?

A. I had charge of what was known as the "printing floor."

Q. Who first called your attention to the label known as Exhibit C?

A. As I stated before in my answer, I cannot remember the name of the dealer, or his place of residence, by whom my attention was first called to it.

Q. You say the plaintiffs changed their label so as to resemble Exhibit B. Point out the particulars of that resemblance.

315 A. I think so, and my reason for saying so is that the ground-work of both labels when folded on top of the boxes are almost precisely similar in appearance: also the lettering on the sides of the labels, when folded, is almost alike, and the change from a light to deeper color in the label marked C from the exhibit marked A.

Q. Is not the ground-work of Exhibit A made up of fine straight lines, crossing each other at right angles, diagonally across the box when folded, while the ground-work of C is made up of small circles crossing each other?

A. No, sir; I think not.

Q. Is not the ground-work of Exhibit B made up of fine straight lines crossing each other at right angles, diagonally across the box, when folded over it, while the ground-work of C is made up of small circles crossing each other?

A. To a certain extent this is so, only it is not so on top of the labels, on the ground-work. (Upon hearing the question read again, witness says:) I say emphatically no; it is not so.

Q. Is not the lettering different—the wording?

A. It is.

316 Q. Does not that destroy the resemblance between them?

A. Partially so.

Q. Does it not do so sufficiently to prevent one's being mistaken for the other?

A. I do not know that I can answer that question.

Q. Why not?

A. Because I cannot judge as to what other people will do. I mean to say that I cannot positively tell what other people will do; of course I could judge as to what persons may do. I think that the wording does not sufficiently destroy the resemblance so as to prevent one's being taken for the other.

Q. What is there about them that creates the resemblance?

A. The remarkably close resemblance of the color and the general appearance of the labels.

Q. And are they sufficient to enable one to be mistaken for the other?

A. I think so; at least to a certain extent.

Q. State whether, in your opinion, in consequence this resemblance, one of these Exhibits, B or C, could be taken one for the other, and if so by what class of people—whether dealers or consumers, or both.

317 A. I think under some circumstances they could by consumers.

Q. Do you understand lithographic printing?

A. Partially so.

Q. After many impressions have been taken from the same stone, do they not become lighter in appearance and color?

A. That would depend upon the character of the work when it was first commenced.

Q. Looking at Exhibit A, would you say it was one of the first or latest impressions from the stone upon which it was printed?

A. I would say about one of the first.

Q. What makes you think so?

A. The fine lines showing black are so clearly defined, and the fine lettering so clear and distinct, that it could not be worked off on an imperfect or much used stone.

Q. It is your opinion then, that Exhibit A is an impression from a stone rather freshly cut?

A. I should think so.

Q. Is it your opinion that Exhibit A is a lithographic impression or a steel engraving?

A. I should think it was a lithographic impression taken from a steel plate.

Q. You say that when you first began to travel you found a good many of the dealers were selling D'r C. McLane's Liver Pills,

318 under the impression that they were manufactured by D'r James H. McLean; how do you know this?

A. Because they told me so when I called their attention to it.

Q. To what did you call their attention?

A. To the fact that the C. McLane pills they were selling were not manufactured by D'r J. H. McLean, of S't Louis.

Q. Were they selling them as the pills of D'r C. McLane, or as the pills of D'r J. H. McLean?

A. They were selling them in a great many instances as the pills of D'r J. H. McLean.

Q. Give an instance of that.

A. I know of an instance, but cannot give you the name. I can give you the name of the town and place where it occurred. In the store of Powers & Jamison, Hannibal, Marion County, Missouri.

(The witness states on the reading of this deposition he wished to say Palmyra instead of Hannibal.)

Q. State all that occurred there.

A. While I was in the store a man came in and asked for McLean's Strengthening Cordial & Blood Purifier, and he also said he wanted a box of pills, as he had seen from the directions around the cordial that it was necessary to take some of D'r McLean's Universal Pills in
319 cases of constipation, for which he was then taking the cordial, and either M'r Powers or Jamison, I do not remember which one, sold him a box of D'r C. McLane's Celebrated Liver Pills, and after the man left the store I spoke to one of the proprietors about it, and he told me that he had sold several boxes of these pills in the same way.

(Objected to by complainant's counsel as being conversations between third parties.)

Q. Do you know whether this purchaser had ever bought any of D'r J. H. McLean's pills before?

A. I do not. He was an entire stranger to me. I did not even know his name.

Q. What did he do with the pills?

A. He went off with them.

Q. Do you know of any instances where D'r C. McLane's pills have been sold for the pills of D'r J. H. McLean?

A. I do, but cannot call to mind any instance just now; that is, cannot give the time and date.

Q. Do you know of any of the pills of D'r J. H. McLean having been sold for the pills of D'r C. McLane?

A. Of my own knowledge I do not know of any instance.

Q. Did you ever hear of any?

(Objected to by defendant's counsel as being hearsay evidence.)
320 A. I have.

Q. When & where?

(Objected for reasons above.)

A. I could not give you the time and place just now: I heard of it in a general way, and do not know of any instance I could call to mind just now.

Q. Did you ever tell any dealers that they could sell D'r J. H. McLean's pills for D'r C. McLane's pills, or any such thing, in substance?

A. I never told the merchants that they could sell D'r J. H. McLean's pills for D'r C. McLane's pills, but I asked them to do D'r J. H. McLean the justice to make particular inquiries of their customers as to which pill they really wanted, and so to sell them.

Q. How did you happen to say that to them?

A. Because they were selling large quantities of D'r J. H. McLean's "Strengthening Cordial and Blood Purifier," & "Voleanic Oil Liniment," and not as many of the "Universal Pills" as the sale of the other goods and our advertising demanded.

Q. Was that everywhere the case in your district?

A. No, sir.

Q. What connection is there between the sale of Strengthening Cordial and the sale of pills?

A. Because one is an to the other.

Q. Is there any uniform ratio of sales of pills to the advertising of them?

321 A. You mean a proportionate ratio.

Q. I mean a uniform ratio.

A. I think there is. I do not understand it to be a uniform but a proportionate ratio.

Q. What dealer ever told you that on ordering D'r J. H. McLean's pills the jobbing-house would invariably send him D'r C. McLane's pills?

A. J. F. or J. T. Riggs, Iowa City, Johnson County, Iowa, was the last one who told me.

Q. What did he order?

A. He told me that he was very particular in ordering D'r J. H. McLean's "Universal Pills."

Q. Of whom?

A. Of the commercial traveller of the drug-house of Singer, Miller & Wheeler, Peoria, Illinois; also of the house of Fuller & Fuller, Chicago, Illinois. I cannot think of any others now, but if you give me until to-morrow morning I will think them over and give you a dozen instances. I can now further recollect W'm A. Morrison, of Iowa City; also M'r Huntington, of Davenport, Iowa. Not M'r Huntington, but his successor, whose name I cannot recall.

Q. Who told you that you were loosing thousands of dollars every year by such substitution?

A. C. Van Werden, Canton, Lewis Co., Mo.

Q. Who else?

A. Cannot call to mind just now.

322 Q. Will you swear that any one else told you?

A. I will. It has been dinned into my ears so often that I have gotten tired of hearing it.

Q. Who told you that they sent back packages of D'r C. McLane's pills to jobbing-houses as high as three times before they could get D'r J. H. McLean's pills, which they had ordered?

A. J. F. or J. T. Riggs, Iowa City, Johnson County, Iowa.

Q. To what jobbing-house did he give the order?

A. To the jobbing-house of Singer, Miller & Wheeler, Peoria, Illinois, through their commercial traveller at Iowa City.

Q. Any others?

A. None others as high as three times.

Q. Did you ever sell, or try to sell, D'r J. H. McLean's pills in the place of the pills of D'r C. McLane?

A. No, sir; emphatically, no.

Q. Did you ever know of its having been done?

A. No, sir; I do not know of its ever having been done.

Q. Did you ever sell either of these pills at retail by the box?

A. I have sold both.

Q. Where?

A. In D'r James H. McLean's family medicine store, 314 Chestnut street, S't Louis, Mo.

323 Q. You sold large boxes containing dozens of either kind, as wanted, did you?

A. No, sir.

Q. Never sold more than one small box at a time?

A. Never more than one small box of D'r C. McLane's Celebrated Liver Pills at once.

Q. When one kind was called for or ordered, did you ever sell the other kind?

A. No, sir; I never did.

Q. Who filled ordered received by letters while you were there?

A. I did part of the time, and a young man named James Jackman part of the time, and also Charles Byerbock.

Q. During that time were any orders received by letter for D'r C. McLane's Liver Pills?

A. Not to my knowledge.

Q. Who opened the letters?

A. D'r James H. McLean sometimes, when there, and his bookkeeper, John G. Taylor, in his absence.

Q. Did D'r James H. McLean fill any orders received by letters himself?

A. I don't think he did; I never saw him fill one.

Q. Did he bring the orders contained in the letters to you which he directed you to fill?

324 A. In almost every instance he did.

Q. In some cases, then, he directed you to fill the orders without delivering you the letters containing them?

A. Yes; when the letters containing other matters which required attention they were retained in the bookkeeper's desk, on file in the office, subject to my inspection at all times.

Q. Then you saw every letter received by him which contained an order?

A. I did, or might have seen them, if I wished.

Q. I did not ask you if you might have seen them, but if you did see.

A. I saw almost every important business letter that came into the office while I was there.

Q. Then you saw every letter received by him which contained an order for pills?

(Objected to by defendant's counsel, as question has been fully answered.)

A. Yes; I am positive I did.

Q. Is D'r McLean now using the label marked "Exhibit B?"

A. He is not.

Q. When did he stop using it?

A. About last May, 1872.

Q. What label does he now use?

325 A. He uses the same label that is marked "Exhibit G." (Said label is hereto attached & marked "Exhibit G.")

Q. Since D'r McLean adopted Exhibit G, has he sold any pills put up with & label' with Exhibit B?

A. Yes, sir.

Q. How many?

A. I do not know.

Q. What proportion of his sales?

A. Very small.

Q. What was the reason of his making the change, if you know?

A. My impression is that it was to make the distinction between the two pills as wide as possible.

Q. Did he tell you so?

A. No, sir.

Q. How do you know it, then?

A. From the general tone of his letters and instructions to me.

Q. Then that is an inference of yours, is it?

A. Yes, sir.

Q. Then you consider that prior to the adoption of this last label there was danger of one being sold in place of the other, do you?

A. No, sir.

326 Q. Then what was the necessity for making the distinction still greater?

A. I do not know.

Q. Would not the danger of one article of pills being substituted for another be much greater if D'r J. H. McLean was using Exhibit B than it would if he was using Exhibit G?

A. To some extent I think it would.

Q. Do you consider that there would be any danger of substitution provided D'r J. H. McLean was using Exhibit G and Fleming Bro's was using Exhibit A or C?

A. There would be no danger as between Exhibit A and Exhibit G, or between G and C.

Q. What conversation have you had with D'r McLean, and when, in regard to your testimony in this case?

A. On two occasions—the first time, about two or three weeks ago, he told me that he would require me to make my deposition as to what I knew about the sales of his pills, meaning the "Universal Pills," and D'r C. McLane's "Liver Pills," prepared by Fleming Bro's, as the matter had gotten into litigation.

Q. Have you not talked with him on the subject since you began to give your deposition here?

A. Yes, sir.

327 *Q.* He told me that Fleming Bro's had brought this suit under the impression that we were selling his "Universal Pills" for D'r C. McLane's "Liver Pills," and he asked me to state fully and freely all I knew on the subject. He furthermore said, to be as concise and brief as possible in my answers, which is about all that I recollect of any importance.

Q. Is that all he said?

A. All that I can recollect just now.

Q. Have you a good memory?

A. Not very good.

Q. Did he say anything to you about what you had already testified?

A. Yes. He said not to (be) so lengthy in my explanations, but to answer yes or no. That is all, sir.

Q. Does D'r McLean pay you a salary, or have you an interest in the profits of any sales?

A. I have no interest in the profits of any sales. He pays me a salary.

Q. When you travel, do you carry specimens of your goods with you?

A. When travelling by wagon, yes; when by rail, no.

Re-examination:

Q. What are and what have been your instructions from D'r McLean, as his agent, in selling his "Universal Pills"?

328 (Objected to by counsel for complainant.)

A. My special and general instructions from him were to call the dealer's attention to the fact that there were two McLean pills in the market—one under the title of "McLane's Celebrated Liver Pills," prepared by Fleming Bro's, No. 60 Wood street, Pittsburg, Penn., and his, D'r J. H. McLean's "Universal Pills," manufactured at 314 Chestnut street, S't Louis, Mo.—and always to endeavor to make the distinction

both in ordering from their jobbing-houses and in selling to their customers.

Q. Did you obey the instructions?

A. Yes, sir.

(Objected to by complainant's counsel.)

Q. Do you know anything further in regard to the matters in controversy between the parties to this suit? If so, state.

A. No, sir.

Michael L. Houts—Deposition of.

My name is Michael L. Houts; I reside in the city of S't Louis, and am thirty years of age. I am travelling agent for James H. McLean for the sale of D'r James H. McLean's family medicines. I have been in the employ of D'r James H. McLean for the last six years. I have so'd D'r McLean's Strengthening Cordial & Blood Purifier, Vol-
329 canic Oil Liniment, Chinoidine Sugar Pills, Universal Pills, and Candy Vermifuge. I have now, as D'r McLean's travelling agent, a particular territory over which I travel. At this time my territory is Arkansas, Texas, and Louisiana. I have had territory for the last eighteen months. Prior to this time I travelled over Missouri, Iowa, Nebraska, Kansas, Illinois, Indiana, Kentucky, Tennessee, Mississipi, Alabama, Georgia, and Florida. As such agent, I distributed D'r James H. McLean's printed matter, and transacted his business as salesman and collector. As salesman for D'r McLean, I sold his "Universal Pills" along with the balance of his preparations. I advertised and distributed the advertisements of D'r James H. McLean's "Universal Pills" through my territory, both entire territories above named, everywhere I travelled. I recognize the exhibits marked "Exhibits E 1, E 2, & E 3, and F" as advertisements distributed over my territory—both territories. Exhibits marked "D 1" & "D 2" were distributed among dealers, "D 3" & "D 4" were used as wrappers around the "Universal Pills."

(Complainant's counsel objects to all evidence relating to advertising matter as being irrelevant and incompetent and not raised by the pleadings.)

330 Q. Are D'r McLean's "Universal Pills" prominently advertised in these advertisements?

(Objected to by complainant's counsel as being irrelevant and incompetent.)

A. Yes, sir.

Q. I will ask you whether or not the advertisements used by you were the means you took to make D'r McLean's "Universal Pills" known to the parties to whom you sold?

(Objected to by complainant's counsel for the reasons above.)

A. Yes, sir.

Q. Did you take any other means; and, if so, what?

(Objected to by complainant's counsel for same reasons as above.)

A. We marked the trade-mark of these pills, "Universal Pills," upon board fences, and impressed the difference of trade-marks upon wholesale and retail dealers.

Q. What advertisement did you put upon board fences?

(Objected to by complainant's counsel for reasons above given.)

A. Those of D'r James H. McLean's "Universal or Vegetable Liver Pills."

Q. You spoke of impressing the difference upon wholesale and retail dealers. What difference did you mean, and between what?

331 (Objected to by complainant's counsel as being irrelevant and incompetent.)

A. The difference between manufacturers, so that they might distinguish between the pills that go with the "Strengthening Cordial," manufactured by D'r James H. McLean. I have reference to the retail dealers, when I say they.

Q. You say to distinguish the pills that go with the "Strengthening Cordial;" from what did you desire to distinguish them?

(Objected to by complainant's counsel as being irrelevant and incompetent.)

A. From the liver pills manufactured by Fleming Bro's, known as "McLane's Celebrated Liver Pills."

Q. I will ask you whether or not you always impressed that distinction upon dealers with whom you came in contact?

(Objected to by complainant's counsel as being irrelevant, incompetent, and leading.)

A. I did.

Q. Have you stated every effort you took and every effort you made for the sale of D'r James H. McLane's "Universal Pills"?

A. I have.

Q. Are you acquainted with the pills manufactured by Cochran Fleming, known as D'r C. McLane's "Celebrated Liver Pills"?

332 A. Yes, sir.

Q. Is the paper marked "Exhibit C" used by them?

A. I have seen the label marked "Exhibit C" used by them since last winter, or a year past.

Q. Look at label marked "Exhibit A."

A. Exhibit A has been used by them since I have been travelling for D'r J. H. McLean.

(Counsel for complainant says that witness further said, "and ever since I commenced to travel, up to the present time." Witness says he did not intend to make this statement, and has no recollection of doing so.)

Q. Up to what time, to your knowledge, did Fleming Bro's, or Cochrane Fleming, use the label marked "Exhibit A"?

A. I first noticed this label marked "Exhibit A" about January, 1872.

Q. When did you first notice the label marked "Exhibit C"?

A. From about January, 1872, and from that time up to the present.

Q. I will ask you whether or not Exhibit A had been exclusively used by Fleming Bro's prior to January, 1872?

(Objected to by complainant's counsel as leading.)

A. I think it has been.

Q. What, if any, label was used by Fleming Bro's prior to Jan-

333 uary, 1872, upon this D'r C. McLane's "Celebrated Liver Pills"?

(Objected to by complainant's counsel because the answer desired has been indicated by a prior illegal question.)

A. Exhibit A has been used by them.

Q. Did D'r James H. McLean, for whom you acted as agent, use any label upon his "Universal pills"?

A. Yes, sir.

Q. Is Exhibit B the label used by him?

A. Yes.

Q. How long was that label used, to your own knowledge?

A. Since I have been travelling for him.

Q. When did you first know him to use that label?

A. In January, 1867.

Q. I would ask you if the lettering, the name of the "Universal Pill," the name of the manufacturer, and place of manufacturing is not plainly designated upon the label marked "Exhibit B"?

(Objected to by complainant's as being irrelevant and incompetent & leading.)

A. It is, distinctly, all.

Q. Take Exhibits A and B and state whether there is any resemblance between them, and what it is, if any.

A. I think there is none.

Q. State what Exhibits A and B purport to be.

334 A. Exhibit A is the pill manufactured, or label manufactured, by Fleming Bro's, known as D'r C. McLane's "Celebrated Liver Pills", of Pittsburg, Penn.; Exhibit B, manufactured by D'r James H. McLean, of S't Louis, Missouri, known as D'r James H. McLean's "Universal Pills."

Q. I will ask you whether or not any person who could not read would be likely to mistake D'r James H. McLean's "Universal Pills" for D'r C. Lane's "Liver Pills," from the labels around their respective pills?

(Objected to by complainant's counsel as being incompetent, irrelevant, and leading.)

Q. Is there any resemblance between Exhibits A & B as would deceive uneducated or illiterate people, consumers?

(Same objection as above.)

A. I think not.

Q. I will ask you, M'r Houts, whether, from your knowledge and experience as salesman of proprietary or patent medicines, there is any intention to imitate or substitute Exhibit B for Exhibit A?

A. No.

Q. That is your opinion from experience as salesman, is it?

(Objected to by complainant's counsel as above.)

A. It is.

Q. Look at Exhibit C and state what that is.

335 A. It is the label of the pills known as McLane's "Liver Pills," which I have noticed since on or about January, 1872.

Q. Compare Exhibit C with Exhibit B, and state if there is any similarity between them; and, if so, state in what it consists.

(Objected to by complainant's counsel as being irrelevant, incompetent, and immaterial.)

A. The wording is not the same, the ground-work of C has been darkened, while B is unchanged.

Q. Well, is there any similarity as to color, shape, and size?

(Same objection made by complainant's counsel as above.)

A. The size is about the same; that of B, cross lines; those of C, a part are curved lines.

Q. Well, as to general appearance?

(Same objection made by complainant's counsel as above.)

A. I think I stated that all above. In general appearance they are about one size.

Q. I do not mean as to size, but looks; as to general appearance.

A. One might be mistaken for the other by those who cannot read or those purchasing in haste.

Q. I will ask you, from your knowledge and experience, if a party using Exhibit A should change to Exhibit C whilst another was

336 selling under the proprietary stamp of Exhibit B, there would be, in your opinion, a design to imitate and sell under Exhibit B by the parties using Exhibit C?

(Objected to by complainant's counsel as being irrelevant, incompetent, and immaterial.)

A. I cannot say that there would be a design, but by not having Exhibit B they might palm off Exhibit C for Exhibit B upon those who could not read or take time to read them, of course.

Q. Do you know when this litigation commenced about these labels?

A. I do not.

Q. Do you know when or about the time Exhibit G was substituted for Exhibit B?

A. I first noticed Exhibit G in July, 1872, but from the label I notice that the change was made 21st of May, 1872.

Q. What is Exhibit G?

A. It is the wrapper used on D'r James H. McLean's Universal Pills (either the wrapper or label) at the present time.

Q. I will ask you whether or not Exhibit G is not more distinctive and better distinguishes D'r McLean's Universal Pills from Cochran Fleming's McLane's Liver Pills than did the labels used prior to May 21st, 1872?

(Objected to by complanant's counsel as being irrelevant, incompetent, &c.)

337 A. It better distinguishes from Exhibits A & C than Exhibit B did from Exhibits A & C.

Q. I will ask you now whether the sales of D'r James H. McLean's Universal Pills, as far as you know, have increased or diminished since the adoption of the more distinctive label marked "Exhibit G"?

(Objected to by complainant's counsel as being irrelevant, incompetent, and immaterial, and argumentative.)

A. Yes; I have noticed an increase.

Q. Large or small increase?

(Same objection as above.)

A. They have increased more rapidly in sales than before the introduction of label Exhibit G.

Q. From your knowledge and experience, is it your opinion that the increase is the result of such distinction?

(Objected to by complainant's counsel as being irrelevant, incompetent, and immaterial.)

A. I think it is.

Q. As the agent of D'r James H. McLean, are you instructed in your duties by special or general instructions regarding the sale of his Universal Pills?

(Objected to by complainant's counsel as being leading, incompetent, immaterial, and incompetent.)

338 A. Our instructions are to sell our medicines and pills wherever we can effect a sale, believing them to be superior to all others, regardless of manufacturer.

(Answer objected to by complainant's counsel as not being responsive to the question and voluntarily giving the belief of the witness in a matter about which he has not been interrogated.)

Q. I will ask you if you received instructions as his agent: and, if so, what were these instructions?

A. My answer is the same as above.

Cross examination:

I receive a salary from D'r James H. McLean. I have no interest in the profits.

Q. You state that one means you took was to mark the trade of

these pills upon board fences. What was the mark you put on the board fences?

A. "D'r J. H. McLean's Universal Pills," and frequently adding, "S't Louis, Missouri."

Q. How frequently did you add "S't Louis, Missouri," and when did you begin to make that addition?

A. On about one-half of the signs, commencing the addition about August, 1870.

Q. Why did you then commence making that addition?

339 A. To impress more especially where the preparations were put up, that there might be no mistake.

Q. Who directed you to do so?

A. I did it of my own accord.

Q. In so doing, were you acting solely for the purpose of distinguishing between your pills and any other kind?

A. I did more especially, & at the end of each sign placed up for D'r McLean's Strengthening Cordial, that dealers could not palm off any other pills with the cordial, except giving D'r J. H. McLean's Universal Pills; that is, those signs were placed immediately after the signs of the Strengthening Cordial—a continuation.

Q. You mean, so that a party purchasing the Strengthening Cordial, any wanting pills also should get D'r J. H. McLean's Universal Pills, do you?

A. I do.

Q. What do you mean when you speak of other pills last above: what particular kind, if any?

A. There was no particular kind; any that were placed in the market; because I believed ours (when I say we, I act under the instructions of D'r McLean) to be those that are wanted with the Strengthening Cordial when the cordial is called for.

Q. You tried to make it understood that the party who was

340 selling the cordial was also the proprietor of the pills, did you?

A. The proprietor of the Universal Pills.

Q. Did you give any special attention to pointing out the difference between your pills and those sold by Fleming Bro's, of Pittsburg?

A. More especially since they used the new label marked "Exhibit C," which I first noticed January, 1872.

Q. Did you do so at all before that time?

A. I did in very few instances, as I thought before that parties could not be so easily deceived from the similarity between A & B as they could between Exhibits C & B.

Q. How many times did you do before that time?

A. I cannot tell how many times, as I visited hundreds of dealers, and do not remember how many I spoke to on the subject.

Q. Why did you do so at all?

A. Because in a few instances dealers exhibited to me Fleming & Bro's pills, known as McLane's Liver Pills, wrapped in label Exhibit A, and associated them with preparations put up by D'r James H. McLean, and in justice to both I stated to them the difference.

What do you mean by "associated them," as used in your last answer?

341 A. Because they thought they were prepared by D'r James H. McLean, and went with his line of preparations.

Q. What made them think so, if you know?

A. They were distributing his advertising matter, which created a demand for his Strengthening Cordial and the balance of his prepara-

tions, which impressed them, I presume, that they were also selling his pills.

Q. Then it is simply a presumption of yours?

A. In many cases they told me that this was the fact.

Q. That what was the fact?

A. That they were selling the preparations of D'r J. H. McLean, of S't Louis, Missouri, which was demanded from his advertising matter distributed among their customers.

Q. Did they tell you so?

A. They did.

Q. How did they happen to exhibit to you Fleming Bro's' pills?

A. Because I asked them, "Do not you keep D'r McLean's Universal Pills, and keep the balance of his preparations?" Their answer was, "We have them," exhibiting the pills prepared by Fleming Bro's. I then thought it was right to distinguish that difference.

Q. Did you often have occasion to do so?

342 A. Not so often before January, 1872, when I noticed the label marked "Exhibit C."

Q. Did you ever have occasion to point out the distinction between your pills and Brandreth's pills, or Ayer's pills, or Jayne's pills?

A. Only that of being cheaper, and being as good or better than either of the above-named pills.

Q. Were you ever a retail druggist, or a wholesale druggist?

A. No, sir; nor was I ever employed in a wholesale or retail drug-store.

Re-examination:

Q. How long have you been employed, or what experience have you had, in selling and handling what is usually known as proprietary or patent medicines?

A. About six years.

Q. You spoke of associating the Universal Pills with the other line of proprietary medicines manufactured by D'r J. H. McLean; what connection, if any, was there between them?

(Objected to by complainant's counsel as being irrelevant, incompetent, and immaterial.)

A. That of being recommended and used with the Strengthening Cordial, for various diseases, published in our printed matter.

Q. Do you mean by being published, that one was advertised

343 by the other, or by the advertisement accompanying the other?

(Objected to by complainant's counsel as being irrelevant and incompetent.)

A. Do you mean the Strengthening Cordial and the Universal Pills?

Q. Yes.

A. One always created a demand for the other.

Q. You spoke of calling the attention of dealers to the distinction between Cochran Fleming's pills, known as D'r C. McLane's Celebrated Liver Pills, and D'r J. H. McLean's Universal Pills. For what reason did you do so?

(Objected to by complainant's counsel for the same reasons above.)

A. I did so from the reason that I knew the printed matter had created a demand for the Universal Pills; and up to January, 1872, it was not necessary to call their attention as frequently as from January, 1872, up to a few weeks ago, when I left my route.

Q. What do you mean by "the printed matter"? To what printed matter have you reference?

A. All that is used and circulated by D'r James H. McLean, of S't Louis, Missouri.

(Objected to by counsel for complainant for reasons above stated.)

Q. Used and circulated for what purpose?

344 (Objected to for the same reason by complainant's counsel.)

A. To advertise his medicines all over the United States, or as far as I have travelled over the States.

James H. McLean—Deposition of.

My name is James H. McLean; age, 44. My occupation is druggist, dealer in medicines, & proprietor in medicines. My residence is S't Louis, Mo., since 1849, in November. My place of business is ℔ 314 Chestnut street, of said city; formerly ℔ 74 Chestnut street. I manufacture proprietary medicines. I have been engaged in the manufacture of my own proprietary medicines since 1851. In 1849, '50, and part of '51, I manufactured Mexican Mustang Liniment, under the firm name of Bragg & McLean. I commenced in 1851 the manufacture of D'r McLean's Volcanic Oil Liniment, which was the most important, & D'r McLean's Universal Pills, in a small way. In 1850 I put up the first lot of D'r McLean's Universal Pills for wholesale; then in the firm of Bragg & McLean. I put them up in one batch of 25 to 50 gross. I do not recollect more than one batch, because it caused trouble in our firm in putting them up, D'r Bragg contending

345 that the firm had no right to sell any other than Bragg's pills. I called the pills I then put up D'r McLean's Universal Pills. I continued to put up the pills after that time in a retail way. I put them up after the trouble in the firm in a small way until 1852, then I put them up to wholesale by my travelling agents. Sept. 2d, I find I have shipped a small lot to my travelling agent at Springfield, Illinois, and continued from then until now to sell them wholesale and retail, just as I could. I advertised my medicines very largely from 1851 to the present date. I advertised from 1851 to 1865, $384,000.00 worth of advertising. My advertising included my Universal Pills. I advertised in newspapers, in pamphlets, and in 1853 I commenced the publication of an almanac. I published my almanac every year. I have a full list of the almanacs except a few years of the first part; I mean a few years after I commenced publishing the almanac. The pamphlets, circulars, and almanacs were scattered all over the western and southern countries, in fact all over the United States, as far and wide and as extensive as my means would allow. Here are specimens of my almanacs; one for 1865 and one for 1874. (Witness refers to Exhibits

A & B, R. E. C.) I exhibited one other, marked "C, R. E. C."

346 a circular to solicit the cards of dealers throughout the U. S. for almanacs. I have been sending circulars marked "C" as long as I can recollect. My first recollection is 1855 or 1856; I do not recollect exactly the year I first commenced to send them out. I enter another, Exhibit D, a similar circular to Exhibit C, sent to dealers all over the United States, to get their cards for almanacs. The latter I commenced to send in 1872, instead of the other. The circulars are for the purpose of soliciting cards of dealers to print on my almanacs, at the same time to call their attention to D'r J. H. McLean's Universal Pills, and to make them particular in their orders for D'r J. H. McLean's pills. You will notice in Exhibit C the language, and quote as marked on the first page. Notice on Exhibit D the difference of the language on the first page. When I used the name McLean's pills, I meant D'r J. H

McLean's Universal Pills and nothing else. I have other samples of my advertisements, envelopes, Exhibit E and Exhibit F. They are to be printed on the back my advertisements, and given to the dealer' all over the country to be used as my envelopes, to be sent by mail wherever they may see proper, besides the immense quantity I use in my own business, to send out circulars in, and letters, my
347 advertisements, my medicines, D'r J. H. McLean's Universal Pills. Since 1865 I think I have not advertised largely in newspapers. I have relied principally upon advertising my business in the exhibits I have shown you: also advertised largely all over the U. S. D'r J. H. McLean's Universal Pills on fences, rocks, and other public places since 1857. I have continued up to this time painting & stencilling the name of D'r J. H. McLean's Universal Pills, with my other medicines, on public places, as above stated. My principal advertising, previous to 1865, was in newspapers, both in religious and secular papers. I used a wrapper around my boxes of D'r J. H. McLean's Universal Pills in 1851. My recollection is that I had a type-printed label in red letters, and in 1852 I procured a lithographic label in red ink. Exhibit G is the latter and appearance of the one I first got up in lithograph. I have no copy of the one I first got up in 1851. I looked everywhere for it but could not find it. The one I first used was in type—common printing-type. I do not recollect whether there was any difference in the reading or not; the general idea and reading was the same. I changed one or two points on the label after I first got
348 it up. My recollection is I called my pills D'r McLean's Universal Pills, and in 1862, or between that and '65, M'r John Fleming, of Pittsburgh, who owned and put up a pill which he called D'r C. McLane's Liver Pills, suggested (plaintiff's att'ys object to witness stating any declarations of Jno. Fleming,) to me, to make the names still more different and apparant to every one, to add D'r J. H. McLean to the D'r McLean's Universal Pills, and which would make the difference known of his, D'r C. McLane's, Liver Pills. I immediately had it changed to D'r J. H. McLean's Universal Pills. I used Exhibit G, with the changes I have mentioned, and may be some other slight alteration, from the year '52 up to '65, to the best of my recollection. Maybe I continued it until '66, but I then changed it to Exhibit H. In 1854, '55, and continuously until '61 or '62, I purchased materials from druggists, from one party, Jacob S. Merrill. The materials of which the pills are composed would not & did not operate & act on the system as it had prior to the year 1854, and did not give the satisfaction to the public. I commenced an examination why they should not act upon the system as intended, and found the extracts bad
349 and no account, and to get rid of all my pills which were then in the hands of agents all over the country I changed the color of my label to black, and threw all the others in red label in the river and other places. Some of the pills in the hands of agents were good, and good extracts, but I heard from various places good reports, and bad complaints from other places. The complaints were that the pills were too old-looking and they could not sell them because the red label faded. I knew that I could not continue the red and get rid of those bad batches of pills that were mixed among so many others, so to exterminate the bad pills and the good I abandoned the red label and changed the color to black; since then I have had no trouble. Since, I think, 1865, up to about the 21st of May, 1872, I have used the black. I commenced making a new label about the first of April, 1872, because the other label on the stone was blurred and could not get a clear impres-

sion therefrom. May 21st, 1872, I commenced using the new label, Exhibit I. The white portion of the label that was, I checked with dark ink because it got soiled so easily in handling, and made the pills or label look old. The bottom and ends of the label when on the box were white when I first adopted it in May, 1872. Afterwards I
350 had above-mentioned white portion checked or machine-worked in black, because the white paper got soiled so easily. To the best of my knowledge and belief I have given as near a description as I can obtain of my label. I knew John Fleming very intimately. He made his office in my office when he came to S't Louis between the year of '65 and '70. He had a store in New Orleans and bought and sold my medicines, and I made my office his office in New Orleans when I went down there, every winter I believe during the time he was in business there. I do not know Cochran Fleming. I know the house Fleming Bro's, but of my own personal knowledge I do not know who carries it on since the death of John Fleming. They were engaged in drug and proprietary medicines in Pittsburgh, and the same in New Orleans; I understood more exclusively in proprietary medicines in New Orleans than in Pittsburgh.

Question. Was the house of Fleming & Bro. the manufacturers and proprietors of D'r C. McLane's Liver Pills?

Ans. Yes, sir. John Fleming was a member of that house, and the only owner during the time he used to make his office at my store, the only or sole owner of D'r C. McLane's Liver Pills. I know
351 Frank E. Porter. I had a conversation with him prior to the commencement of this suit.

Q. State what his representations were, if any, of his connection with the house of Fleming Bro's.

(Objected to by pl'ff's att'y as incompetent and illegal; no *super* foundation is laid to make it competent.)

Ans. He stated that he is the agent, and I understood him to say that he is part owner of D'r C. McLane's Liver Pills.

Q. Stated the agent of what or whom?

Ans. The agent of Fleming Bro's, the owners of D'r C. McLane's Liver Pills.

Q. State what conversation you had with him, if any, when you saw him, and under what circumstances.

(Objected to as above.)

A. He stated to me that Cochran Fleming was going to bring suit against me for infringement of their trade-mark.

Q. State what conversation you had with him.

(Obj. as above and other reasons.)

Ans. I told him I understood from M'r Gray the day previous that that was his intention, and stated to him I had already commenced engraving a new label, and took him over to the engraver's to see it. It
352 was finished or about finished. Then that day, and when M'r Gray called to see me the day previous, was the first intimation I had ever heard or known by any manner that my label, "D'r J. H. McLean's Universal Pills," was an infringement on C. McLane's Liver Pills. One of the causes of my getting up a new label was to still more distinctly mark the difference between the labels, as my label was getting old and dark, and I had seen a new label of Fleming Bro's which was getting close to my old label in dark appearance. My agents called my attention to it, and sent me one of Fleming Bro's' new labels.

Q. Did Gray state for whom he was acting, or in what capacity?

Ans. He said he was attorney for Cochran Fleming, of Pittsburgh.

Q. Do you know Jacob S. Merrill?

A. Yes, sir; very well.

Q. Did you in November, 1854, have a conversation with him at his store in S't Louis, or elsewhere, in which you stated that, as your name was McLean, you thought you could sell your own pills under your own name on the reputation of D'r Charles McLane's Liver Pills?

353 (Objected to by pl'ff's att'ys as leading, and the proper foundation not having been laid, and otherwise incompetent.)

Ans. No.

Q. Did you or did you not state to him, at the same time and place above mentioned, that you could evade the law by using the words "D'r McLean's Universal Pills for Liver Complaint"?

(Objected to as above.)

Ans. No, sir; because I have ever been a champion for trade-marks, and gave my time and money to sustain the trade-mark law, and could not have stated any such thing to him, because I had a considerable reputation of my own in the liniment, Volcanic Oil Liniment, and also in D'r McLean's Universal Pills, and always endeavored to sell D'r J. H. McLean's pills and advocate them as being superior to all other pills in the market. The conversations between myself and M'r Merrill have always been, that D'r C. McLane's pills were handsomely and finely made—I mean the pills, I don't mean the label—and that I would like, and he has often stated, as well as myself—would like to make pills just exactly like them; and for years we hunted for pill-machines to make a perfect pill just like or equal to D'r C. McLane's pills. I mean the pills. I do not mean the label.

354 Quest. Did you or did you not, at the same time and place, show to M'r Merrill a specimen label gotten up under the idea expressed in the above alleged conversation between yourself and M'r Merrill?

(Objected to as above.)

Ans. No, sir.

Ques. You stated, D'r, that about the 21st of May, 1872, you took great pains to make your labels, and did make a label to your pills more distinctive from the pills manufactered by Fleming Bro's. I will ask you whether or not the sales of your pills have been greater or less since that time?

(Objected to as irrelevant and immaterial by pl'ffs.)

Ans. Yes, sir; to the first part. Yes, to the second portion of the question. The sales of my pills have been nearly 20 times greater than they were before that date. I mean to say, that I sell nearly 20 gross of D'r J. H. McLean's Universal Pills since that time, and up to this date, to one gross before May 21st, 1872, that is, the date of the adoption of the new label.

Ques. You are the defendant in this case, are you not?

Ans. Yes, sir. In explanation of the quantity sold, I do not
355 know the exact amount more, but it requires from 15 to 25 girls to supply the demand wrapping and putting them up, and previous to that time one or two girls were sufficient to do the work to supply the demand previous to May 21st, 1872.

Q. Is there anything further?

Ans. John Fleming (any statement of John Fleming's objected to), the owner and sole proprietor of D'r C. McLane's Liver Pills, and doing business in New Orleans, selling the same, with other medicines, between the years of '65 and '70, or '71, bought largely (pl'ff objects to this statement) from me of D'r J. H. McLean's Universal Pills, and

sold and traded them in his store in New Orleans, and by special request that I should sell his pills, D'r C. McLane's Liver Pills, when they were called for, as well as my own; and such was our understanding. He never intimated that there was any infringement of my label upon his, during the time, up to his death. (Plaintiff objects to the whole statement of Jno. Fleming's acts or words as irrelevant and incompetent under the pleadings in this case.) Since 1865, I have advertised from $50,000.00 to $80,000.00 a year, and it is on the increase, by almanacs, books, pamphlets, &c. I issue' about 8,000,000 per annum previous to the commencement of this suit.

(This statement objected to by pl'ff.)

356 Cross-examination:

Q. Where was your first place of business?

A. Corner of 3rd & Market streets, as Bragg & McLean.

Q. How long did you deal there?

A. One year and a half. The firm of Bragg & McLean dissolved in 1851, the first part of the year; I think in January. My next place of business was corner of 3rd & O'Fallon streets, for myself. I think I remained there about a year, and then, about '52, went on 3rd street, under the Walton House, and I think in '53 I moved to the corner of 3rd and Pine. I think I stayed there until '61, maybe longer; I cannot tell exactly how long. In about '63 or '65, I moved to Chestnut street, No. 74, as it then was, but now is 314 Chestnut street. I don't recollect when the number was changed; I cannot fix the time. It was changed, certainly, 3 or 4 years ago. I don't know how much longer. I don't know how long after I went there it was changed. I cannot fix the time of my moving there any more definitely than I have. I might do so by looking it up, but not from memory.

Ques. What year did you change from your red to your black label?

Ans. I think between the years of '64 and '66.

357 Ques. Did you change from the red to the black *black* label before the change of the number of the street?

Ans. I don't recollect. I commenced using the circular marked "Exhibit D" in, I think, June or July, '72. We date it at the time we use it; there is no date printed on it; we can use it all of a year, and from year to another. I then ceased using circular Exhibit C. I could not state the date nor the year when I changed from putting D'r McLean to putting D'r J. H. McLean. I could not fix the year; my recollection is, between the years '60 and '65; cannot answer more definitely; did not pay much attention, and did keep any old labels.

Q. Look at Exhibit I, No. 1, and also marked "F. E. P." of depositions to the bill, and marked by me "L No. 1, R. E. C."; state what it is.

A. That is the label I first got out, "D'r McLean's Universal Pills."

Q. Did you have more than one plate of the red seal?

A. Yes; I changed it occasionally; made little alteration to suit me, keeping the name and trade-mark and general appearance always the same. The changes here, that I note, are that the "Universal" is not prominent enough. I changed it, and made it more prominent;

358 that, in connection with my name, being my trade-mark. This exhibit above-mentioned was , and while I was on 3d and Pine streets. I could not tell when the change I speak of was made. It has a fac simile of my signature. Exhibit G is a fac-simile of my label. I used the same appearance, as far as possible. Exhibit G was printed a few days ago from the same stone that Exhibit H was printed from, the only difference being in the color of the ink. I can-

not swear that I used a label of which G is a specimen, excepting one or two words, I don't recollect which, in the upper part of the label. When I changed it to a black label, I made some change in the wording in the upper part of the label. This is the only stone I have left, the use from which the red and black label were printed. The exhibit marked "L No. 1, F. E. P.," as above, is the first label I used, and I have kept the same general appearance, and especially the trade-mark, "D'r McLean's Universal Pills"; the rest of the words I have changed to suit my change of my place of business. Alex. McLean printed some of my labels; also some other lithographer printed some; some were printed in my own establishment. I commenced printing in my own establishment before I went on Chestnut street. I do not recol-

359 lect who prepared the stones; I had a number of engravers. I had had a stamp of a light red seal on the lid of my boxes. I think I commenced using it in 1852. I am confident I commenced using it shortly after I commenced putting up the pills to sell wholesale. I used a seal to stiffen the box, to wrap it well, and to designate my name, J. H. McLean, St Louis, Mo., in the seal. I used a red seal because it was the cheaper and easiest to make. I do not know whether or not I knew the Fleming Bro's used a red seal. I never took it into consideration, because I always regarded D'r C. McLane's name as a trade-mark. (Last clause objected to by plaintiff as not responsive to question.) I sold their pills. I don't recollect when I commenced selling their pills; but when I commenced business I sold their pills, and I sold all medicines that were called for. I commenced the drug business in 1849, to the best of my memory. I don't know when I first knew that the Fleming Bro's used a red seal. I don't know it now.

Ques. Don't you know that Fleming Bro's on their label direct attention to the red seal on the box?

Ans. No, sir; I don't know it.

Ques. And do you say that you don't know and never knew that they used a red seal on the box?

Ans. Of my own knowledge, no.

360 Q. What colored label did Fleming Bro's use when you first knew their pills?

Ans. I don't recollect; they have changed their label, and of my own knowledge I know nothing.

Q. Don't you know that it was a red label when you first sold them?

Ans. No; I never saw a red label with Fleming Bro's on it, and don't believe there ever was a red label with Fleming Bro's on it.

Q. Up to what time did you continue to sell their pills?

Ans. Up to to-day.

Q. Did you ever sell the D'r C. McLane pills, manufactured by Jon. Kidd & Co.?

Ans. I think I did.

Q. What kind of a label did those have?

Ans. To the best of my recollection it was a pink label.

Q. Did you ever see a label like that (Exhibit J) before?

Ans. I think I have.

Q. You have sold the C. McLane pills with that label, Ex. J?

Ans. I think I have.

Q. State whether this Ex. J was the first label you knew for the C. McLane pills?

Ans. I do not recollect.

361 Q. Do you recollect whether the first label that you knew of the C. McLane pills was a pink or a light-colored label like that?

Ans. I do not recollect even that, as I never sell medicines by the color of the label, but by the name and trade-mark.

Q. When did you first get acquainted with John Fleming?

Ans. I think it was in 1857 or 1858.

Q. Do any business with the house?

Ans. I believe I did; do not recollect exactly what amount.

Q. Do you recollect what kind it was?

Ans. No, sir; I am speaking now of the Pittsburgh, not the New Orleans house.

Q. Did you do business with Jon. Kidd & Co.?

Ans. That is my recollection. I have done business with every wholesale drug house in Pittsburgh as far back as '51.

Q. Do you know who composed the firm of Jon. Kidd & Co.?

Ans. No, sir. I have heard it said that John Fleming was one of the firm. I do not know it to be so.

Q. Do you use a seal on your box of pills?

Ans. Yes.

Q. What kind?

Ans. A green seal. D'r J. H. McLean, S't Louis, Mo., May 21st, 1872, as before.

362 Q. Then you have changed the color of your seal?

Ans. Yes, sir.

Q. Why?

Ans. Because M'r Porter told me at that time that they claimed the red seal on their box as part of their trade-mark. Also, M'r Gray, their attorney, told me so.

Q. Did you not know that before?

Ans. No, sir; I never thought of it.

Q. Have you never noticed this on the C. McLane label, marked "Exhibit J," "in future my genuine liver pills will have a red, steel engraved wrapper, and my name in red wax on the box"?

Ans. I have never read it, to my knowledge.

Q. At the time you adopted your red label, didn't you know that the C. McLane pill was sold in a red wrapper?

A. I did not, or I knew they had a red label, but I paid no attention to the color of anybody's label.

Q. Did you know of any other pill that was sold in a red label?

A. Yes, sir.

Q. What one?

A. The Graffenburg, and two or three others, I think.

363 Q. Did you know of the label of the C. McLane pill being changed to a dark label?

A. I think I recollect the change.

Q. When was that change made?

A. I could not tell—I do not know.

Q. You can give no idea of the change?

A. We never look at the color of labels when we sell.

Q. Can you tell whether the change from the red to the dark label was before or after your change?

A. I think it was before—some years before.

Q. Then you knew that fact at the time when you made the change?

A. I do not know whether I knew it or not; I paid no attention to it whatever.

Q. When you changed your label in '72, did you gather in the old labels that you had out?

A. No, sir, not particularly so.

Q. Did you at all?

A. When they came in to me, if they were spoiled, I changed them.

Q. Your selling was mostly through travelling agents, was it not?

A. In all ways—travelling agents and wholesale dealers.

Q. Then you did not send out and collect the old labels?

364 A. They are generally sold when sent out. I always take old medicine and place it in new wrappers, but when my travelling agents bring them back, as they often do, I relabel them.

Q. Did you do this to any extent?

A. Yes, sir.

Q. How extensive?

A. I cannot tell. My orders to my travelling agents is to take up old medicines that have been on hand for six months and return them for new labels.

Q. How often do they return them?

A. Some every 3, some 6, some every 9 months.

Q. Do you mean that any of them take out enough to last them nine months?

A. No, sir, I ship them weekly.

Q. How long a supply do they take out?

A. About a week's supply.

Q. Until they return, they don't send back?

A. Oh, yes. Whenever they have enough old medicines to fill a box they send them back; old medicines are duty-labelled medicines.

Q. Do any of your travelling agents keep what they start with, and don't sell until they return?

A. I never knew a traveller to return with what he took out. He has a fresh supply every week; he takes up all the old and fills its 365 place with new medicine. Every one can sell a load in a week—some more, some less.

Q. Do you deposit with people in the country to sell on commission?

A. Yes, sir, with all merchants.

Q. Do they ever return what they don't sell within a certain time?

A. No, sir. If the goods are soiled, and the agents want them, they return them.

Q. How long do goods sometimes remain out before they are sold?

A. May be a year.

Q. And if they sell that's the end of it. Do you make it a point to gather up at some definite time?

A. Every time the agent goes around he renews the supply.

Q. How often does he go over the same ground?

A. Sometimes 3, 6, or 9 months, according to the location.

Q. A man who goes out on 9 months' trip takes the whole time to go over the route?

A. Yes; he does not return until he goes over his route.

Q. When he has left goods, those remain for sale until he comes around again?

A. Yes; if he sells out he is supplied by me—sometimes by wholesale dealers.

Q. Is that Exhibit K one of your labels?

A. Yes, sir.

366 Q. When were those (K) first used by you?

A. I do not recollect exactly.

Q. Was it before or after Exhibit H?

A. I do not know; I cannot tell which.

Q. Which were you using at the time you changed to Exhibit E?

A. This one (Exhibit H) was the one I was using when I changed to Exhibit E.

Q. Was K used before or after this H?

A. I have two lithographers up-stairs, and they may have wiped out the impression you have there as K. After I commenced the new label I never retained the old one on the stone. This one I have now was retained by accident.

Q. How long and how extensively has Exhibit K been used?

A. I do not recollect.

Q. How do you and people generally pronounce your name?

A. As though it were spelled with an "a." I have five proprietary medicines. I advertise other medicines. I have advertised others. My estimate of advertising included all, for I advertised all together, paying more attention to McLean's Strengthening Cordial than to anything else. I gave those figures as an estimate—not the actual amount.

367 I estimated from one year to another to get at my income-tax, which commenced in, I believe, 1864, but I don't recollect when it ceased—I think, in 1869. Since that I have kept an account, and last year I made a change of my almanac, and in that way had to know the cost of my almanac for 1871. In my advertising account I keep an almanac account. My almanac account does not cover the entire list. My almanac account for 1871 was $64,000, as near as I can recollect. I cannot tell what proportion my almanac account was of my whole advertising account. I claim that my pills cure liver complaint, headache, biliousness, and all irregularities of the stomach and liver, and loin's too, for one sympathises with the other. I called it a universal pill, because it was not exclusively a liver pill—to be a universal pill was for the purpose of acting upon the kidneys as well as the liver, for many are afflicted in that way in this Western country. The Western country diseases requiring an action upon the kidneys as well as the liver, making a universal pill more necessary than a strictly pill. I do not mean by Universal Pill a remedy for all diseases. The name Universal is adopted with reference to the Western country, and especially

368 to distinguish it from all other pills in the market, and especially from D'r C. McLane's Liver Pills.

Q. Is your pill known as a liver pill?

Ans. My pill is known as a pill that acts upon the liver. I could not give another answer.

Q. Is it called a liver pill?

A. No, sir.

Q. What are they called in Exhibit K?

A. Dr. McLean's Universal or Vegetable Liver Pill.

Q. Then you in your labels have called it a vegetable liver pill?

Ans. On that label I call it D'r J. H. McLean's Universal or Vegetable Liver Pill.

Q. Is it not called or ordered as a liver pill?

Ans. No, sir; never, unless it is a mistake. I have not known it to be.

Q. You claim that it is peculiarly adapted to operate on the liver, don't you?

Ans. Yes, sir.

Q. In speaking of it, then, isn't actually called a liver pill?

Ans. No, sir,

Q. Never knew it to be so called?

Ans. No, sir.

Q. If you were to receive an order for a liver pill, what would you send?

Ans. If in connection with my medicines I should conclude that my pills were wanted.

369 Q. Why, if a liver pill was ordered—yours is not called a liver pill—would you consider it an order for your Universal Pill?

Ans. Because, where my strengthening cordial is used, D'r J. H. McLean's Universal Pill is always wanted; because every label on my strengthening cordial bottle states to take in connection with it some of D'r J. H. McLean's Universal Pills; and the same with D'r J. H. McLean's Volcanic Oil Liniment, the same with D'r J. H. McLean's Chinoidine Sugar Pills, for fever and ague; the same with D'r J. H. McLean's Candy Vermifuge; and if they were or had ordered my medicines, I would know that they wanted my pills; and that was the reason I sent out Exhibit C years ago, to make them particular about their ordering.

Q. Was Exhibit C the first circular of a similar character that you issued?

Ans. I have issued so many that I cannot recollect whether it was the first, but I have been sending it out, or one like it, for 15 or 16 years, and still mistakes are made sometimes.

Q. Where did John Fleming live in his life-time?

Ans. In Pittsburgh and New Orleans. His principal home was Pittsburgh.

370 Q. How long has he been putting up proprietary medicines?

Ans. I don't know.

Q. How long have you been putting up your different medicines?

Ans. Since 1851.

Q. All of them since that time?

Ans. No, sir.

Q. All of them since that time?

A. No, sir.

Q. Fix the time.

Ans. I think I put up as a specialty D'r J. H. McLean's Volcanic Oil Liniment, only selling D'r J. H. McLean's Universal Pills and D'r J. H. McLean's Strengthening Cordial in a small way. I always made it a rule to run one medicine. I can't tell the times, the dates when I started the other medicines.

Q. When persons take your strengthening cordial, does it become necessary to take all your other medicines?

Ans. No, sir; not always.

Q. Are all the other medicines a liver medicine?

Ans. No, sir.

Q. Look at Exhibit Q, J. H. B., also mark' "Exhibit O, A. B.," and state whose handwriting it is.

371 Ans. I think it is my handwriting.

Q. Have you any doubt about it?

Ans. Yes, sir; but I had correspondence with those gentlemen about that time, and I think that is my handwriting.

Q. Look at Exhibit P, J. H. B., also marked in red ink "Exhibit P, A. D.," and state in whose handwriting it is.

Ans. I think it is my handwriting.

Q. In like manner, look at Q, J. H. B., and also marked in red ink "Q, A. D.," and state in whose handwriting.

Ans. That's in my handwriting.

(Said exhibits marked, respectively, "Q, R. E. C.," "P, R. E. C.," and

"Q. R. E. C.," but not attached to this deposition, they being exhibits to Cochran Fleming's deposition on file in this case.)

Q. Have you any labels which you first used, of which Exhibit I is one, without the machine or checked work on white ground?

Ans. No, sir.

Q. Have looked for any?

Ans. Yes, sir.

Q. Isn't the effect of this check or machine work on the white ground to make it more nearly resemble your dark label, of which Exhibit H is a specimen?

Ans. No, sir; most emphatically, no.

372 Re-examination:

Q. D'r, you were shown Exhibit K. How long have you used it?

Ans. Since last evening I have endeavored, by refreshing my memory, and I find I have only used it a few months, because my "Universal" was not prominent enough in the label, the word "Universal." I had it rubbed off the stone, and a new label, marked "Exhibit H," with the Universal more prominent upon it.

Q. What do you mean—that you had a new label on it, H?

Ans. Substituted for the other.

Q. What time was that, D'r?

Ans. I think in 1865 or 1866.

Q. You testified in your cross-examination that there was a number of other pills made and sold about the commencement of the manufacture of your pills; will you state by what name they were generally designated?

Ans. By the name they were called—Strong's Liver & Stomach Pills, Graffenburgh's Liver Pills, printed with a red label, and a large number of others that I don't recollect the name of, called Liver Pills.

Q. Can you tell how far back these pills you have mentioned were made and sold?

373 Ans. I can recollect since 1844 of a number of pills, and commonly called Liver Pills. It was a common name with drug and medicine dealers since 1844.

Q. I'll ask you with regard to the color, whether red was an ordinary color or unusual color.

Ans. It was an ordinary color: black and blue, as the fancy of the maker suggested. A large number were printed in red ink. In the last 10 or 15 years all dealers have abandoned the red ink on labels, because the red ink faded and made the medicines look old.

Q. You testified in your cross-examination that you began putting up your medicines in 1851. What did you mean to say by that?

Ans. I commenced putting up D'r J. H. McLean's Volcanic Oil Liniment principally and specially, and advertise' and push' it at the same time. Having very little money, being poor, I could not manufacture D'r J. H. McLean's Universal Pills and D'r J. H. McLean's Strengthening Cordial only in a small way.

Q. Had you been in business prior to that time?

Ans. Yes, sir.

Q. What kind of business.

Ans. In the medicine business, putting up Mexican Mustang Liniment as a specialty, and in the drug business in the firm of Bragg &

374 McLean.

Q. Had you manufactured any medicines prior to 1851?

Ans. Yes, sir.

Q. What medicines?

Ans. Principally Mexican Mustang Liniment, and one batch of D'r J. H. McLean's Universal Pills in 1850, say 25 to 50 gross.

Q. Then you ceased for a time to put up the Universal Pills?

Ans. Yes, sir.

Q. When was that?

Ans. In 1850, because it caused trouble in our firm.

Q. What time did you commence again the manufacture of your Universal Pills?

Ans. In 1851 or 1852; I cannot recollect exactly when. I commenced putting them up in a small way, to retail them & to prescribe them.

Q. Look at Exhibit O, J. H. B., and state what you mean by saying "I have referred my pill and vermifuge orders to our wholesale druggists, because I do not keep any medicines on hand except my own liniment."

(Objected to by pl'ff as incompetent. The paper is to explain itself. The court is to construe the paper.)

375 Ans. I mean to say that I was too poor to put up a vermifuge and pill myself to wholesale, and had no means to put up any other medicines to wholesale and send out with my teams. I was putting up my Universal Pills and Strengthening Cordial, and was keeping a general medicine store at the time, and specially referred to the fact that I had no means to carry on any other medicine except my Volcanic Oil Liniment.

(The whole answer is incompetent and is objected to.)

Q. If any explanation is desired to be made by you, you may explain.

Ans. In the general medicine store I kept and sold all medicines that were called for, and especially D'r C. McLane's Liver Pills.

John Hall—Deposition of.

My name is John Hall. I am a manufacturing druggist in a small way. My residence is S't Louis. I have had wagons traveling for many years. My place of buisness is on Magazine street, between Garrison and Webster avenues. I travel in wagons myself. I have been dealing in patent medicines for at least 14 years; I might say 20 years. In this and the old country I have been dealing in medicines for 25 years.

I know D'r James H. McLean, of S't Louis. I have known him 376 about 14 years. I am acquainted with the medicines he manufactures. I deal in all of them. Some of them are, McLean's Universal Pills, Chinoidine Pills, Cordial, &c.

Q. Do you know Fleming Bro's, of Pittsburgh?

A. By reputation.

Q. What is their business?

A. Wholesale manufacturing druggists, I believe.

Q. Do you know the pill manufactured by them called D'r McLane's Liver Pills?

A. I know them.

Q. Do you know the last label used by them?

A. Yes; I know the one they use now. I deal in D'r C. McLane's Liver Pills and in D'r McLean's Universal Pills.

Q. Is it or is it not usual for dealers to mistake one for the other?

A. I can't say what dealers would do, whether they would mistake one for the other. The parties with whom I deal are accustomed to ask for either D'r C. McLane's Liver Pills or for D'r J. H. McLean's Uni-

versal Pills, and I carry both, and furnish them with what they want; and they often ask merely for McLean's Pills.

Q. If you know, state how are D'r J. H. McLean's pills generally known among the people with whom you deal?

377 A. They are known as D'r J. H. McLean's Universal Pills.

Q. Are they or are they not generally and extensively known to the public as D'r J. H. McLean's Universal Pills.

(Objected to by pl'ff as directly leading.)

A. My customers will ask for them in that way if they want them.

Q. I will ask you whether or not there is such a resemblance between the labels used by D'r J. H. McLean for his Universal Pills and the labels used by Fleming Bro's for D'r C. McLane's Liver Pills as would deceive a person of ordinary scrutiny. I ask you as a person of long acquaintance with, and dealer in, medicines?

A. There is no resemblance that would give me any trouble to know them.

Q. How would it be with persons of ordinary scrutiny?

A. With persons of ordinary scrutiny I don't think there would be any trouble to know the difference.

Q. State, if you know, during your long dealings in medicines, whether or not the words "Liver Pills" are usually or unusually used among persons dealing in medicines.

(Objected to by pl'ff as incompetent.)

A. The words "Liver Pills" is a common thing among dealers in medicines.

378 Q. Has it been so long?

A. As long as I recollect. Since I have been in the business "liver pills" has been a common thing.

Q. State, if you know, what colors are ordinarily used by pill-makers for their labels.

A. All medicine-men use different colors—black, blue, red, gold colors, and all colors—pretty near all colors, brown. In our own city there are many different colors. Ever since I have been in the business it has been so. One puts up in one color, another another.

Q. Were you ever in D'r J. H. McLean's employ?

A. No, sir.

Q. Have any dealings with him?

A. Yes, sir.

Q. Of what character?

A. Bottled his medicines, sold them, and paid him for them. I sold his pills—that I testified. I had no conversation with him about the trade-mark of his Universal Pills. Some years ago I did.

(Any statements objected to by pl'ff.)

Q. What was it?

(Objected to as above.)

A. I said I would like him to make his label resemble the Pittsburgh pill more.

Q. Did he do it?

(Objected to as above.)

379 A. No; he told me he didn't want to do it. He said he did not want to make them resemble the Pittsburgh pill; he wanted them to go on their own foundation.

Cross-examination:

Q. When was it you had this conversation?

A. I don't recollect.

Q. About how long ago?

A. It might have been 5, 6, or 7 years ago, when I was running the country. I have not run the country for 3 or 4 years.

Q. Where did you get your stock of pills?

Q. I have bought pills from Collins & Bro., Richardson & Co., Meyer & Bro's, W'm B. Parker when he was in business, Wetzler & Bro. when in business, Merrill, D'r McLean, and several more, but I can't recollect them.

Q. When any one called for McLean's pills, what did you give them?

A. I couldn't answer that question. I gave them McLean's pills, of course, when they asked for them.

Q. Which McLean's pills did you give them?

A. I could not tell. I have sold so many of all kinds that I couldn't tell which when I got them.

Q. Why did you tell D'r J. H. McLean that you would like him to make his label resemble the Pittsburgh pill more?

380 A. I never told him to make the label to resemble the pill.

Q. What did you tell him?

A. That I would like him to make the label resemble the Pittsburgh label. That it was a better paper, and better package and box, and looked better in all ways than his did.

Q. What difference did it make to you?

A. It would sell better.

Q. Why did you want the pill to sell better?

A. I would make more money, the more I would sell of them.

Q. Why couldn't you sell the Pittsburgh pill, which was already being put up in such fine style?

A. I have sold them. So I did to every one that wanted them. I have not been without them in my wagon, for several years, for a week at one time.

Q. Do you pronounce McLean and McLane alike?

A. Yes.

Q. How do people generally pronounce the names, alike or different?

A. I couldn't answer. I am so familiar that I would not notice the difference—alik'—I have no idea how the general people call it.

Q. How have you heard D'r J. H. McLean's name pronounced?

381 A. I have heard it pronounced both McLeen and McLane.

John G. Taylor—Deposition of.

My name is John G. Taylor; age, 39; residence, 2720 Sheridan avenue, S't Louis; occupation, bookkeeper for D'r. McLean, the defendant in this case. I have been in his employ 13 years. I have heard of the firm of Fleming Bro's, of Pittsburgh. D'r McLean's firm has never had dealings with Fleming Bro's, of Pittsburgh, but they have had dealings with Fleming Bro's, of New Orleans. John Fleming constitutes the house of Fleming in New Orleans. He was interested with the Pittsburgh house according to my knowledge. I mean that this latter is out of my knowledge. That was in '68, '69, and I believe in '70. The firm of J. H. McLean had several bills of goods order, by the New Orleans house of Fleming Bro's, both verbally and by letter. John Fleming ordered them verbally. He ordered Strenthening Cordial, Liniment, Universal Pills, and Vermifuge. By ordering I mean that he purchased the goods for D'r McLean. I am acquainted with D'r McLean's labels, and am somewhat acquainted with the changes made on them. I think Exhibit H was adopted as a label in '64 or '65. He continued to use it until

May, '72. Prior to that he used a label similar to Exhibit G. I
382 can't say exactly like it, but similar to it. I have no distinct remembrance of Exhibit K; it must have been used previous to '64: it is one of D'r McLean's labels. I do not know when or how long he used it. Exhibits A, B, C, D, E, & F, are D'r McLean's advertisements, in part. They are used to the extent of about $75,000 to $80,000 a year, including the almanac. These advertisements are sent all over the U. S., with the exceptions of Maine. They are also sent to different parts of Europe. There were over 6,000,000 distributed year before last, '71, to the best of my knowledge. When I first went with D'r McLean he advertised 50,000, then 250,000, then 4,000,000, and so on to the present it increased. Those advertisements included Strengthening Cordial, Universal Pills, Candy Vermifuge, and Liniment, & Chinoidine Pills.

Q. By what name are D'r J. H. McLean's pills generally known, if you know, by dealers and consumers?

A. They are known as D'r McLean's Universal Pills.

Cross examination:

I went with D'r McLean about the year '60; his place of business was then on the corner of 3rd and Pine streets. He moved to Chest-
383 nut street in, I think, '64. When I went there he was using a pink label.

Q. Look at Exhibit I, No. 1, F. E. P., also marked "I, No. 1, R. E. C.," and state whether that is one of his red labels?

A. It appears like one. I am not certain.

Q. If it differs from it, in what respect does it differ?

A. The only difference I see is in the scroll around the "Universal." It looks like the same one, that is, general appearance, of the one he was using when I first went there. I have noticed the labels particularly. I have noticed the changes; my business did not call my strict attention to them, as I was bookkeeper. In, I think, '64 or '65 he changed from a pink to a dark label. I am not positive as to the dates or year. I know of no change in the pink or red label being made after I went there, until the change to the dark label. I sell D'r McLean's pills when any one comes in and calls for a box, and no one else is in, but I am not a salesman.

Q. How do you know, then, by what name his pills are known among consumers?

A. By occasionally selling a box from his office.

Q. Is that the extent of your knowledge as to what name they are known to consumers?

384 Ans. No, sir.

Q. What is the extent?

A. The extent of my knowledge with regard to the name, by dealers, is through letters and orders, but it is the extent of my knowledge as far as consumers are concerned.

This was all the evidence submitted to the court, and thereupon, on the fourth day of June, 1874, the court made and entered of record the following decretal order, to wit:

COCHRAN FLEMING, COMPLAINANT, } In chancery.
vs.
JAMES H. McLEAN, DEFENDANT. }

Now at this day come the parties to the above-entitled cause, by their

solicitors, and a hearing, commencing on the first day of June, A. D. 1874, having been had on the bill, answer, replication, exhibits, and depositions filed herein, and this cause having been tried on the pleadings and proofs, and submitted to the court, it is, upon full consideration thereof by the court, ordered, adjudged, and decreed, that the said defendant, James H. McLean, his agents, employees, and servants, be, and they are hereby, perpetually enjoined and restrained from using, or causing to be used, the words, "D'r J. H. McLean's Universal Pills or Vegetable Liver Pills," or the words, "D'r McLean's Universal Pills," or the words, "D'r J. H. McLean's Universal
385 Pills," upon any label or wrapper for boxes or other packages of pills, resembling or in imitation of the labels, or wrappers, or trademark of complainant, Cochran Fleming, described in his said bill as Exhibit H, whether in style of engraving, printing, or lettering, and from vending or exposing for sale, or causing to be vended or exposed for sale, any article of pills having upon the boxes or other packages thereof any such labels or wrappers so made in imitation of, or resemblance to, the said labels or wrappers of complainant: the said defendant, not however being enjoined or restrained from using said words, "D'r J. H. McLean's Universal or Vegetable Liver Pills," or the words, "D'r J. H. McLean's Universal Pills, or Vegetable Liver Pills," or the words, D'r McLean's Universal Pills," or the words, "D'r J. H. McLean's Universal Pills," on any other labels or wrappers for pills than these herein described. And the court does further order that the bill, answer, replication, and proofs be referred to Joseph Shippen, esquire, master in chancery, to take and state an account of the damages resulting to said complainant since November 9, 1870, from the violation by said defendant of the rights of said complainant, as the same may appear from the proofs produced before him: and it is further ordered,
386 that said defendant, James H. McLean, upon due notice so to do, produce before said master a full, just, and true account, verified by his affidavit, stating what number of boxes of pills he, said defendant, has made and sold since the 9th day of November, A. D. 1870, having thereon, or attached thereto, the label or wrapper described in the bill as Exhibit L, or the label or wrapper described in the bill as Exhibit K, and showing at what price the same were sold, and at what profit; and that said master, from all the evidence produced by the parties, report to this court with all convenient speed the amount of damages sustained by the complainant in the premises.

And afterwards, on the 8th day of June, 1874, the following appears of record in said cause, to wit:

COCHRAN FLEMING, PLAINTIFF,
vs.
JAMES H. MCLEAN, DEFENDANT. } In chancery.

This day comes the defendant, by his solicitor, and files a petition for a rehearing in this cause, for the reason set forth in said petition, which having been submitted to the court, and by it considered, it is ordered that said petition be and the same is now hereby overruled.
387 The said petition for rehearing is as follows:

Petition for rehearing.

In the United States circuit court, eastern district of Missouri.

COCHRAN FLEMING, COMPLAINANT, *vs.* JAMES H. MCLEAN, DEFENDANT. } In equity.

To the honorable Samuel Treat, judge of said United States circuit court:

The defendant, James H. McLean, by T. W. Stratton, his solicitor, comes and prays the court to set aside the decree in said above-named cause rendered, and grant him a rehearing, for the reasons:

First. That it appears from the record and evidence, and from the testimony of the complainant, that in the year 1855, and at various times after that date, the said complainant had knowledge of the manufacture and sale by defendant of D'r J. H. McLean's "Universal or Vegetable Liver Pills;" and it appears by the evidence of the defendant, James H. McLean, and by the evidence of John G. Taylor, that at various times between the years 1865 and 1870 that John Fleming, the immediate predecessor of complainant, was perfectly familiar with the manufacture by the defendant of his said pills and the use of the labels thereon: that
388 said John Fleming, by words and actions, acquiesced in the use by defendant of said labels; that on the 9th day of November, 1870, complainant became the successor and owner of the pills and labels manufactured and sold by said John Fleming, as "D'r Cha's McLane's Celebrated Liver Pills." It further appears by the evidence of Frank E. Porter, introduced by complainant, that he, as the agent of said Cochran Fleming, on or about the 20th day of May, 1872, called on the defendant and remonstrated with him for using the label similar to Exhibit K, in imitation of the label of complainant; that the defendant thereupon, and on the same day, showed said Porter the new label, Exhibit E, of defendant's deposition; that on the 21st day of May, 1872, defendant adopted said new label, Exhibit E of defendant's deposition, and from said 21st day of May, 1872, ceased to use or expose for sale his said pills in said wrapper or label marked "Exhibit K;" that complainant's bill was not filed until the 2d day of June, 1872, at which time it was not shown that defendant was using, nor threatening to use, nor continuing to use either of said wrappers or labels marked "Exhibit K" and "L" of complainant's bill.

Second. It appears from the evidence that complainant came
389 into possession and ownership of said pill and label called D'r Cha's McLane's Celebrated Liver Pills as the devisee of John Fleming, and with full knowledge that the defendant, D'r James H. McLean, was manufacturing and selling his said Universal Pills, and that he had been so doing for many years before, and all that using the label which complainant seeks to enjoin him from using; that said complainant with said knowledge permitted defendant to continue the manufacture and sale of his said pills with the said label and wrapper similar to Exhibit K thereon for more than eighteen months without remonstrance from said complainant.

Wherefore defendant prays this honorable court to set aside said decree and grant him a rehearing, and will ever pray, &c.

T. W. STRATTON,
Sol'r for Def't.

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391 And afterwards, to wit, at the March term, 1875, of said circuit court, Joseph Shippen, esquire, master in chancery, filed his report on March 29th, 1875, which said report is in the words and figures following, to wit:

Master's report.

In the circuit court of the United States for the eastern district of Missouri.

COCHRAN FLEMING, COMPLAINANT, *vs.* JAMES H. MCLEAN, DEFENDANT. } In chancery. No. 319 (O. S).

To the honorable the judges of said court:

The undersigned, master in chancery, to whom, by a decretal order made in the above-stated case on the fourth day of June, A. D. 1874 (a certified copy whereof is hereto appended), the bill, answer, replication, and proofs therein were referred to take and state an account of the damages resulting to said complainant since November 9th, A. D. 1870, from the violation by said defendant of the rights of said complainant as the same might appear from the proof produced before him, and to report to this court, from all the evidence produced by the parties, the amount of damage sustained by the complainant in the
392 premises, begs leave to present the following report.

Pursuant to notice (of which a copy is hereto appended), duly served on the defendant and on the solicitors of the complainant, there appeared before the master, at the time and place therein specified, M. S. Gray, esq., and George Denison, esq., solicitors for the complainant, and James H. McLean, the defendant, together with his solicitors, Samuel Reber, esq., and T. A. Stratton, esq.; and thereupon and at many subsequent hearings in the matter held at the same place, pursuant to adjournments made from time to time, at all of which both complainant and defendant were duly represented, there were had the proceedings of which a record is herewith separately filed, together with the testimony and exhibits presented.

Upon due notice (a copy of which is hereto appended) from the master, given in accordance with said decretal order, to the defendant, James H. McLean, to produce before the master a full, just, and true account, verified by his affidavit, stating what number of boxes of pills he, the said defendant, had made and sold since the 9th day of November, A. D. 1870, having thereon or attached thereto the label or wrapper described in the bill as Exhibit L on the label or wrapper described in the
393 bill as Exhibit K, and showing at what price the same were sold and at what profit, the defendant produced and filed before the master, on the ninth day of July, 1874, the sworn statement of account hereto appended, marked "Master's Exhibit No. 1."

No motion, exception, or objection was made thereto by the complainant at the time, or at any time until the close of the hearing December 24th, 1874, when exceptions thereto were presented, which are herewith filed.

Upon the production by the defendant of the said statement, Exhibit No. 1, the complainant proceeded to examine the defendant relative thereto, and to investigate his books of account, and to offer a large amount of evidence relative to the defendant's business, and especially the portion thereof connected with the making and vending of the pills

in controversy. Thereupon, on the 21st day of October, 1874, the defendant produced and, under objection of the complainant, was allowed by the master to file an amended statement of account in place of said first one, which amended statement is hereto appended and marked "Master's Exhibit No. 2." (See testimony, page 124.) To this statement the complainant made exceptions, both to the filing and to the contents thereof, which exceptions, taken December 24th, 1874, are herewith filed.

394 The respective parties, both in the management of the case and upon argument, regarded these statements of account made by the defendant very differently. The complainant held that the first (No. 1) purported to be only a compliance with the decree, and not evidence by which the complainant was bound, and that in fact it was not even such compliance as it so purported; and that it could only serve to charge the defendant with what was therein stated as admissions against his interest; but that, merely upon the statement as made, no credits could be allowed the defendant by way of discharge, and these must be shown by the defendant by due extrinsic evidence.

Contra. The defendant maintained that the sworn accounts of defendant must be accepted prima facie as correct, and while the debit side served to charge him, the credit side with equal force discharged him, and the accounts must stand until overthrown, and then be modified only so far as required by the complainant's evidence.

The master feels relieved from defining the exact effect of these two statements of account, because the complainant did not rest upon his said legal position relative thereto, but adduced proofs above stated, adequate to the entire overthrow of the first and to the overthrow

395 of the results of the second. The first statement, indeed, was wholly abandoned by the defendant himself upon his filing the amended statement, the items of which are in amount and character quite at variance with the first statement. By the second, the defendant accepted the results derived in evidence from his own account-books, and in a large measure incorporated them therein. This statement, moreover, is more full and detailed than the first one, and has for some items, instead of suppositions and imaginations, some basis of fact and an approximation to accuracy. Hence the master hereinafter uses the said second statement as a basis on which to conduct his examination of the evidence and to restate the account in conformity with the facts as proven and the law he deems applicable thereto.

It is shown by the evidence as well as the defendant's statements, and it is conceded by the complainant, and the master accordingly so finds, that of boxes of pills made and sold by the defendant since the ninth day of November, A. D. 1870, having thereon or attached thereto the label or wrapper described in the bill as Exhibit L, there were none.

It is shown by the evidence (res. testimony, page 13), and the

396 master accordingly so finds, that on the twenty-first day of May, 1872, the defendant ceased to make or sell boxes of pills having thereon or attached thereto the label or wrapper described in the bill as Exhibit K.

Hence the investigation is confined to ascertaining the damages resulting to the complainant from the making and selling of pills having thereon or attached thereto the label described in the bill as Exhibit K, for the period of one year six months and thirteen days, between the 9th day of November, 1870, the date designated by the decree, to the date of said cessation, the twenty-first day of May, 1872. The decree

implies, and it is conceded by both parties, that said damages are to be measured by the actual net profit (if any) made by the defendant, which is now to be ascertained.

The defendant's account-books, to which free access was granted to the master and to an expert accountant, H. R. Driggs, engaged to work thereon, embrace the whole business of the defendant in making and selling five distinct proprietary medicines, as also many expenses wholly unconnected therewith, as repairs of real estate, household and travelling expenses. Defendant says his five medicines were alike in
397 importance to him, made in the same laboratory by the same hands, and to some extent of the same materials, advertised equally, and sold in the same way in the usual current of his business. Hence he found no need of keeping any separate account of the cost of the universal pills or any other one medicine; and being alone in business, without any partner, it mattered not to him that affairs extraneous to the medicine business found their way into the account-books. The result is that a very large portion of defendant's outlays are charged to his business generally, and no proof can be made of the specific items or accounts applicable to the universal pills alone.

Thereupon the complainant maintains that, as the decree has ascertained defendant tortfeasor, guilty of pirating complainant's trademark, and has required him to account for his profits as a trustee, the defendant should be allowed no credits for expenses incurred in his medicine business, other than may be shown by clear and specific proof to have been separately connected therewith, and that the principle applicable to the wrongful confusion of goods, or the assets of a trust tortuously commingled with the property of the trustee, finds appropriate application here.

398 Contra, the defendant admitting his inability to make proof of the exact expenses incurred by him on behalf of the universal pills, claims that he is entitled to credit for one-fifth part of the whole amount of his general business expenses, and it is upon this theory that the credits claimed in his said two statements of account are stated.

The master rejects both of these theories, the former because inequitable, and leading to results that would not present the actual net profit of the defendant sought for, and the latter, because arbitrary and not founded on facts. Neither theory can be sustained throughout upon either principle or authority.

That some portion of defendant's general business expenses was, in fact, occasioned by the making and selling of the universal pills, and that the same ought in equity to be allowed as a credit in ascertaining the actual net profit, cannot be doubted. The difficulty lies in ascertaining what that portion is. Upon the foregoing facts the master is of opinion that in ascertaining the credits to be allowed defendant—

1st. All items of expenditure not directly connected with defendant's medicine business are to be wholly eliminated from consideration.

2nd. All items of cost and expense traceable by specific proof to the universal pills alone should be allowed as credits.

399 3. The amounts of the other expenses incurred generally in defendant's medicine-business, to which he is entitled to credits, should be ascertained by the following proportion, viz.: As the gross amount of the sales of medicines is to the gross amount of the sales of the universal pills, so is the gross amount of such general business expenses to the proper amount thereof sought for to be applied to said pills as a credit in the account.

This mode of appointment should be resorted to only when necessary, and in such cases it is restrained by authorities cited in the briefs of both complainant and defendant. (Rubber Company v. Goodyear, 9 Wallace, 788; Hitchcock vs. Tremaine, Fisher's Pat. Cases, 312.)

The difficulty herein before stated is not encountered upon the debit side of the account, because the defendant's account-books are sufficiently explicit to show about how many universal pills were sold, and the amount received therefor. The testimony of the expert accountant is that the books show that during said period of time between the 9th day of November, 1870, and the twenty-first day of May, 1872, the defendant made and sold thirteen hundred and seventy-seven and nine and one-half twelfths (1,377 $^{9}/_{12}$) gross of the pills, and that dur-
490 ing said period the defendant sold merchandise, incapable of specification into items, to the amount of twenty thousand three hundred and ten dollars and eighty-two cents (20,310.82) monthly, for cash. The amount of pills embraced in these cash sales may fairly be estimated at one hundred and one and a half (101½) gross. This is obtained by stating a proposition—as the whole amount of sales is to sales of pills, so is this amount of cash to the proportion thereof derived from pills—and then by dividing this result by the average price of pills per gross. Thus the total amount of pills sold is ascertained and estimated at 1,479 $^{3}/_{12}$ gross, and the average price realized thereon was $14.74 per gross, and the aggregate amount of cash received therefrom by defendant was $21,817.57. (See testimony, page 218.)

The difference between this result and the combined result of the first three items of the defendant's amended statement (Exhibit No. 2), viz, 1,467 $^{9}/_{12}$ gross, is in the amount the pills (only 11 $^{6}/_{12}$), and is, there being a slight difference in the average price per gross, in cash only $34.57; accordingly, as a portion of the amount derived from the books by the expert accountant is only an estimate, the master accepts the combined result of the first three items of defendant's said amended statement as correct, viz, $21,782.98, as the total amount of
401 debits.

Contra. The defendant, by said second statement, Exhibit No. 2, to discharge himself by claiming on the other side of the account the following credits (see page 4), viz:

1. By estimated amount of pills returned, exchanged, &c., sale $^{a}/_{c}$	$4,667	15
2. By estimated amount unsold, &c., commission $^{a}/_{c}$	4,972	87
3. By material, 1,472 $^{9}/_{12}$ gross @ 8.00	11,782	67
4. " estimated freights	115	00
5. " movable stock $^{a}/_{c}$	861	63
6. " estimated rent	1,501	36
7. " advertising account	157	37
8. " printing and paper account	15,201	95
9. " expense account	7,448	56
Total	46,708	56
Deducting above stated gross sales	21,782	98
Leaves total net loss, as claimed by the defendant	24,925	58

Each of these nine items will now be examined in the light of the evidence and the governing principles hereinbefore stated.

1. The defendant more fully states this item as "Estimated number

of boxes of pills exchanged and returned, including sundry discounts on and of amounts as entered, 'Sales on account,' 339$\frac{10}{12}$ gross @ $14.50, $4,067.15."

402 2. Defendant more fully states that the 2nd item as "Estimated number of boxes of pills exchanged, unsold, returned, and unaccounted for, including sundry discounts allowed as entered, 'Sent on commission,' 311½ gross @ 15.96, 4,972.87." These two items amount to 9,640.02, and are disallowed, as unwarranted by the evidence. The first purports to relate to pills actually sold and delivered. The second purports to relate to pills sent out to be sold on commission. Upon their face they are presented only as estimates, but the theory upon which they are made remains unexplained. Defendant, in his first statement (Exhibit No. 1), claimed that just one-third part of all his pills sent out were returned. In his own testimony on this subject (see testimony, pages 52 to 79) he states that May 21st, 1872, he abandoned the label K and substituted a new one therefor, and he thereupon called in all the pills that were out; and that from twenty years' experience in the business he found that upon such a change of label the pills returned should be estimated at 33⅓ per cent. of the whole. (See testimony, page 61.) He states that he began to send out pills for sale on commission in 1872, but did not do so largely till 1873. Prior to that time he had very little on commission; it was principally sales (see testimony on page 46), and it would be impossible to tell the

403 ratio between the two amounts. (See testimony, page 75.) For any pills having thereon the label K sold prior to May 21st, 1872, the defendant cannot entitle himself to credit by calling them in by consent of the owner to change the label. Defendant's account-books show the aggregate of all merchandise returned within the period of time under consideration to be only $363.90 (see testimony of Driggs, page 219), and for a proper proportion of this due credit will hereafter be allowed. The evidence fails to show anything relative to the "sundry discounts" embraced by defendant in these items. Although stated in the first account as one item, comprising 33⅓ per cent. of the defendant's entire business in these pills, yet his second statement the defendant claims, by the two items above quoted therefrom, credit and deduction of nearly 44 per cent. of all pills made. The claim is based on assumptions of fact not only *not only* unwarranted, but substantially disproved by the evidence. Hence these two items are disallowed.

3. The defendant more fully states his third item thus: "Material, including waste, for manufacturing and putting up 1,472$\frac{10}{12}$ gross, @ 8, $11,782.67." The number of gross thus stated exceeds by 5½ gross the amount stated in said record statement and herein accepted

404 as correct. Error to this extent, of $40.67, is apparent on the face of the item. Beyond this, the price named, of $8 per gross, is to be tested by the evidence, for the defendant fixed the same only as an estimate derived, as he says, from long experience, and although he attempted to sustain it by a series of items entering therein, they are stated so inaccurately and at random as to be quite untrustworthy.

The testimony shows (page 383) that a batch of pill-mass weighing 26 pounds avoirdupois is composed as follows:

Materials.		Price.		Cost.
4 lbs.	Castile soap @	14c		$0 56
4½ "	podophyllum "	65		2 92½
4 "	black-root "	23		92
3 "	aloes "	25		75

Materials.		Price.	Cost.
2	lbs. gamboge	@ 1.20	2 40
8	" calomel	" 1.35	10 80
½	" pep'er	" 40	20
	Total		$18 55½

Defendant testifies that this mass is made into five grain pills, of which twenty-five are put into each box, and that one pound of said mass is made by machinery into sixty-one and a half boxes. He states the number of boxes per pound several times at 62½, but this is
405 manifestly a clerical error in his division of the 7,680 grains, which he estimates and insists compose a pound, by five and again by twenty-five. If the grains are according to apothecary weight and the pounds according to avoirdupois, there are only 7,000 of the former in the latter. The defendant, however, is so conversant with these weights and states so definitely that of one pound of mass he makes by machinery 61½ gross of boxes of pills, that the master feels constrained to accept his statement regardless of the discrepancy in the two kinds of weights. (See testimony, page 389.)

The cost of labor in making and handling the pills is embraced in the item "general expenses," and is elsewhere allowed for. The following items of cost are, however, to be allowed for as a necessary expense connected with the pills:

Coating, per gross of boxes	$0 30	
Boxes, do.	27	
Paper boxes, do.	20 5/11	
Gross boxes, do.	12	
Sawdust, do.	03	
U. S. stamps, do.	1 30 10/11	
Total	2 23 74	

Add thereto the cost of the material in a gross of boxes (ascertained by dividing the cost of a batch of mass by
496 25 and by 61½ and multiplying the quotient by 144) $1 67

And we find the cost of materials, boxes, &c., to mount to 3 90 74/100

Multiplying this by the number of gross sold by defendant, 1467 9/12, we obtain the total cost for which credit should be allowed defendant. 5,735 08

4. The defendant's account-books show that the total amount of freight and discount on bills is 8,076 13
Amount of merchandise returned 363 90
Total $8,440 03

Taking the pro rata part of this total upon the ratio of the whole sales of merchandise to the whole sales of these pills, we ascertain the amount thereof to be allowed as a credit is $621.24. The proportion formerly stated is as follows, according to the evidence: $205,938.41 : $21,782.98=$8,440.03 : $621.24.

5. The defendant's fifth item is false, movable stock @, $861.63, and

is arrived at by him by taking one-fifth part of all the loss claimed to be sustained for the period of time under consideration. (See amended statement, page two.)

The testimony (see pages 628 to 642) shows that in defendant's
407 accounts "movable stock embraced all purchases of horses, mules, harness, and vehicles of the defendant, whether the same were of use in his business, or for his family, or individual use. No inventory of the stock was at any time taken in a reliable way, and there is nothing to show, either in the testimony or defendant's books, whether there was any actual gain therein, or whether there was actual loss. The plaintiff dividing the gross amount by five is inadmissible, and the master is of opinion that the facts in evidence are too vague and uncertain to warrant him in allowing even the pro rata in this item which is stated and allowed in some other cases. Hence this item of credit as claimed by defendant is disallowed.

6. The defendant next claims credit for estimated rent, $1,501.36, and this is arrived at by putting the rent of his office and laboratory, located on Chestnut street, between 3 & 4th streets, in St Louis, at $5,000 per annum for the time taken into account, and then dividing the amount, as in other cases, by five.

The evidence shows that a portion of defendant's building was occupied by a tenant, and the remaining portions, which were devoted
408 to his business, were worth $3,000 per annum. At this price, for the time taken into account, the amount is $4,586.29, and of this a due pro-rata portion is appropriated to the pills and allowed to the defendant as a credit. This pro rata is represented by the decimal fraction .0736, and the amount is thus ascertained to be $337.55.

7. The defendant claims credit for the amount spent by him in advertising, $157.37. The whole amount corresponds with the amount ascertained from the account-books for the time under consideration, viz. $786.85, and of this the defendant claim' allowance for one-fifth, upon principles before stated. The master allows only a pro rata part, viz, .0736, which is found to be $57.83, and is stated as a credit.

8. The defendant claims credit for one-fifth of the amount ascertained from the books and accepted by him as the "printing and paper account," $76,009.79. He claims that all five medicines were adv'ised alike, and the principle of equity should be allowed to govern in this item, even if not in some others. Voluminous testimony of printers and paper dealers was offered by the complainant as to the actual and estimated
409 expense incurred. The master is of opinion that the results attained do not differ materially from defendant's account-books in that regard. A considerable portion of the cost in this item was for labels and wrappers and directions accompanying each small package of medicine, and if the amount of pills was relatively smaller than of some other articles, the amount of cost of the gross printing and paper account should be distributed accordingly. But so many uncertainties, estimates, and contingencies are encountered in any attempt so to do, that the master is of opinion that the pro rata upon the basis of sales, before adopted, will yield a result as approximately correct as any that can be otherwise attained. Hence, .7736 of the gross amount is allowed as a credit, and this is found to be $5,594.32.

9. The defendant next and last claims credit for one-fifth of his "general expenses," in the aggregate amounting to $37,242.83, which corresponds to the amount thereof derived from the books. Instead of the one-fifth, the master allows only the pro rata portion before stated, viz, .0736.

Upon investigation, however, of the items in the account books
410 composing the above aggregate, it is found that many, including some important ones, relate to matters wholly extraneous to his medicine business, and these require to be entirely eliminated from the amount before any pro-rata part is ascertained for allowance. Some oral testimony was taken relative to these items, but it does not serve to alter materially the conclusions derived from the statements of the items as they appear on the books. The above aggregate amount of sales ascertained from the books, and accepted by the defendant in his amended statement, is, so far as it relates to the 52 days in the year 1870 and the 141 days in the year 1872, an estimate based upon a proportion derived from the ratio between a whole year and these respective periods of time. The same principle of apportionment is now applied in making the proposed deductions from those respective periods for the expenses extraneous to defendant's business.

The items of the year 1870 to be designated are--

May	23.	Donations	127 50
"	28.	Charity	5
June	3.	Carpets	218 32
Aug.	9.	M. S. Gray, fees	260 00
"	10.	Expenses East, J. H. McLean	386 00
Sept.	22.	Water-license	39 00
Dec.	31.	Repair, &c	254 70
"	"	Furniture	5,243 78
"	"	Donations	588 80
		Sundries	784 51
		Total	7,907 61

411 The items for the year 1871, to be disregarded, are:

April	18.	Hoisting-apparatus	$365
May	9.	Oil painting	100
"	13.	Picture, sunset	50
Aug.	8.	Expenses to California	1,535
Sept.	30.	Water-license, residence	52
Nov.	1.	Overcoat	40
Dec.	30.	Donations	1,919 85
"	"	Furniture	1,121 90
		Sundries	655 25
		Total	$5,839

The items for the year 1872, to be disregarded, are:

June	14.	S't Louis Book & News Library	$175
"	26.	Safe	600
Sept.	24.	Att'y fees in this case	140
Oct.	4.	" " " " "	191
"	5.	Water-license, residence	52
Nov.	9.	Ex. B'k Commerce	2,138 10
"	16.	Life-insurance, C. H. McLean	322 30
Dec.	23.	Pew-rent	52
"	31.	Richards' portrait	45
		All expenses to Europe (less cash returned)	1,926 69
		Sundries	1,068 40
		Total	6,710 49

Of the above items some need the explanation derived from the oral testimony. The hoisting-apparatus was a permanent fixture in
412 defendant's building and laboratory, and the safe was also placed therein. Both are still on hand, and no depreciation therein was shown as to present value. The item "Exchange Bank Commerce" was a part of the expense of defendant's European tour, connected with his letters of credit. (See testimony, page 584.) The items "sundries" were the aggregate of numerous small items of cash, taken chiefly from the cash-book, not relating to defendant's business. They are composed of the items objected to by complainant in the detailed schedule prepared thereof by the expert accountant.

By the proportion on the basis of time above stated, the pro-rata portion of the expenditures to be deducted from the aggregate amount of general expenses for 187' is found to be

the sum of	1,126 56
Ditto, ditto, for 1872	2,592 27
The total of deductions for 1871 is	5,839
Total	9,557 83
From the aggregate expenses above	37,242 83
Deduct this last total	9,557 83
Leaves the true general expenses	27,685
Of this the proportional part is .0736 allowed by the master as credit, which is found to be	$2,037 61

413 Recapitulating the foregoing results, the account is summarily stated thus:

Debit:

Total amount of sales of the Universal Pills (Exhibit K) from November 9th, 1870, to May 21st, 1872	$21,782 98

Credit:

Allowances made on account of said pills for said period, to wit:

Cost of materials, boxes, &c	$5,735 08
Freights paid, discounts made, and goods returned	621 24
Rent	337 55
Advertising	57 83
Printing and paper	5,594 32
General expenses	2,037 61
The balance is the actual net profit sought for	7,399 35
Total	$21,782 98

Wherefore the master finds the damage sustained by the complainant in the premises to be the sum of seven thousand three hundred and ninety-nine dollars and thirty-five cents ($7,399.35), as of the twenty-first day of May, A. D. 1872.

All which is respectfully submitted.

JOSEPH SHIPPEN,
Master in Chancery.

MARCH 23RD, 1875.

Master's fee, by consent of parties, $500.

414 To the honorable the judges of said court:

The undersigned begs leave to report further, that upon the completion of the foregoing report, notice, of which a copy is hereto appended, was given to parties, who, in accordance therewith, examined said report, and appearing on the day designated, presented no objections thereto.

Respectfully submitted.

JOSEPH SHIPPEN,
Master in Chancery.

MARCH 29TH, 1875.

415 UNITED STATES OF AMERICA,
Eastern District of Missouri:

In the circuit court of the United States in and for said district, March term, 1874.

THURSDAY, *June 4th*, 1874.

COCHRAN FLEMING, COMPLAINANT,
vs.
JAMES H. McLEAN, DEFENDANT. } In chancery.

Now at this day come the parties to the above-entitled cause, by their solicitors, and a hearing, commencing on the first day of June, A. D. 1874, having been had on the bill, answer, replication, exhibits, and depositions filed herein, and the cause having been tried on the pleadings and proofs, and submitted to the court, it is, upon full consideration thereof by the court, ordered, adjudged, and decreed, that the said defendant, James H. McLean, his agents, employees, and servants, be, and they are hereby, perpetually enjoined and restrained from using, or causing to be used, the words "D'r J. H. McLean's Universal or Vegetable Pills," or the words "D'r J. H. McLean's Universal Pills, or Vegetable Liver Pills," or the words "D'r McLean's Universal Pills," the words "D'r J. H. McLean's Universal Pills," upon any label or
416 wrapper for boxes, or other packages of pills, resembling or in imitation of the labels or wrappers or trade-mark of complainant, Cochran Fleming, described in his said bill as Exhibit H, whether in style or engraving, printing or lettering; and from vending or exposing for sale, or causing to be vended or exposed for sale, any article of pills upon the boxes or other packages thereof, any such labels or wrappers so made in imitation of or resemblance to the said labels or wrappers of complainant; the said defendant not, however, being enjoined or restrained from using said words "D'r J. H. McLean's Universal or Vegetable Liver Pills," or the words "D'r J. H. McLean's Universal Pills or Vegetable Liver Pills," or the words "D'r McLean's Universal Pills," or the words "D'r J. H. McLean's Universal Pills," or any other labels or wrappers for pills than those herein described; and the court does further order that the bills, answer, replication, and proofs be referred to Joseph Shippen, esquire, master in chancery, to take and state an account of the damages resulting to said complainant since November 9th, A. D. 1870, from the violation by said defendant of the rights of said complainant, as the same may appear from the proof produced before him; and it is further ordered that said de-
417 fendant, James H. McLean, upon due notice so to do, produce before said master a full, just, and true account, verified by his

affidavit, stating what number of boxes of pills he, said defendant, has made and sold since the 9th day of November, A. D. 1870, having thereon, or attached thereto, the label or wrapper described in the bill as Exhibit L, or the label or wrapper described in the bill as Exhibit K, and showing at what price the same were sold, and at what profit, and that said master, from all the evidence produced by the parties, report to this court with all convenient speed the amount of damages sustained by the complainant in the premises.

UNITED STATES OF AMERICA,
Circuit Court for the Eastern District of Missouri, ss:

I, Austin Drake, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a copy of the decree of perpetual injunction and order of reference of date June 4th, A. D. 1874, in case of Cochran Fleming against James H. McLean, as fully as the same remains of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix
418 the seal of said court, at office in the city of S't Louis, in said district, this twenty-fourth day of June, in the year of our Lord eighteen hundred and seventy four.

[SEAL.] AUSTIN DRAKE, *Clerk*,
By H. O. GEISBERG, *D. C.*

Master's notice.

In the circuit court of the United States for the eastern district of Missouri.

COCHRAN FLEMING, COMPLAINANT, *vs.* JAMES H. MCLEAN, DEFENDANT. } In chancery.

To the above-named parties, or to their solicitors:

Notice is hereby given that the above-stated case will be brought to a hearing before the undersigned master in chancery of said court, to whom it has been referred, at his office, number 417 Pine str't, in the city of S't Louis, on Monday, the 6th day of July, 1874, at two o'clock p. m.

JOSEPH SHIPPEN,
Master in Chancery of said Court.

Due and personal service of the above notice, by a copy thereof delivered, is admitted this 25th day of June, 1874.

GEORGE DENISON,
One of Counsel for Complainant.

419 EASTERN DISTRICT OF MISSOURI, *ss:*

George H. Hastedt, being duly sworn, says he delivered a copy of the within notice to James H. McLean, defendant, June 24th, 1874.

GEORGE HASTEDT.

Sworn and subscribed this 24th day of June, 1874.

JOSEPH SHIPPEN,
Master.

In the circuit court of the United States for the eastern district of Missouri.

COCHRAN FLEMING, COMPLAINANT; *vs.* JAMES H. MCLEAN, DEFENDANT. } In chancery.

To the above-named defendant:

You are hereby notified and required to produce before the undersigned, master in chancery of said court, a full, just, and true account, verified by your affidavit, stating what number of boxes of pills you, the said defendant, have made and sold since the 9th day of November, A. D. 1870, having thereon or attached thereto the label or wrapper described in the plaintiff's bill as Exhibit L, or the label or wrapper described in the bill as Exhibit K, and showing at what price the same were sold, and at what profit, on the hearing appointed to be had
420 before said master, at his office, number 417 Pine street, in the city of S't Louis, on the 6th day of July, 1874, at 2 o'clock p. m.

JOSEPH SHIPPEN,
Master in Chancery of said Court.

Due and personal service of the above notice by a copy of the same admitted this June , 1874.

EASTERN DISTRICT OF MISSOURI:

George H. Hastedt, being duly sworn, says that he delivered a copy of the within notice to James H. McLean, defendant, June 24th, 1874.

GEORGE HASTEDT.

Sworn and subscribed this 24th day of June, 1874.

JOSEPH SHIPPEN,
Master.

Exhibit No. 1.

In the U. S. circuit court, eastern district of Missouri.

COCHRAN FLEMING *vs.* JAMES H. MCLEAN.

STATEMENT.

Number of boxes of pills sold of Exhibit L of plaintiff' bill since Nov'r 9, '70	None.
Number of boxes of pills sold marked "Exhibit K" of plaintiff' bill, 1,231 gross, @ 12.00	14,772 00

D'R.

To 410 gross pills returned, @ $\frac{99}{12}$	4,920 00
421 Expense manufacturing material, &c., on 1,231 gross @ 8,00	9,848 00
Freights and extra expenses on pills returned	115 00
One fifth $\frac{1}{5}$ expenses of printing & paper in advertising—whole expenses one & half year $\frac{1}{5}$)87,000.00	17,400 00
	$32,283 00
Loss incurred by sale of Exhibit "K" of	17,511 00

Plaintiff bill seventeen thousand five hundred & eleven (17,511.00) dollars.

S'T LOUIS, *July* 6, '74.

U. S. OF AMERICA,
Eastern District of Missouri, ss:

James H. McLean being duly sworn, says that the foregoing statement is just and true.

J. H. McLEAN.

Sworn & subscribed to this 6th of July, A. D. 1874.

JOSEPH SHIPPEN,
Master.

Exhibit No. 2.

	Number of boxes of pills sold of Exhibit L of plaintiff bill since Nov'r 9th, 1870	None.
422	Number of boxes of pills sold on acc't, marked Exhibit K of plaintiff bill since Nov'r 9th, 1870, 901^{10} gro., @ 14.15	12,750 95
	Number of boxes of pills sent on commission, marked "Exhibit K" of plaintiff bill, since Nov'r 9th, 1870, 474^{15}, @ $15\ 96$	7,571 69
	Estimated number of boxes of pills marked "Exhibit K" of plaintiff bill, sold for cash and through travelling agents since Nov'r 9th, 1870, 91^{6} gross, @ 15.96	1,460 34
	Total sales	21,782 98
	Estimated number of boxes of pills exchanged and returned, including sundry discounts on and of amounts as entered "sales on account," $329\frac{10}{12}$ gross, @ $14.50	4,667 15
	Estimated number of boxes of pills exchanged, unsold, returned, and unaccounted for, including sundry discounts allowed as entered, sent on commission, $311\frac{7}{12}$ gross, @ 15.96	4,972 87
	Material, including waste, for manufacturing and putting up $1,472\frac{10}{12}$ gross, @ $8.40	11,782 67
	Estimated freights & extra expenses on pills returned	115 00

Movable stock acc't.

	Total loss for 1870	1,380 81
423	Pro rata for 52 days, 196.71, $\frac{1}{5}$	39 34
	Total loss for 1871, 3,748.57, $\frac{1}{5}$	749 71
	Do. do. 1872, 939.50	
	Pro rata for 141 days, 362.93, $\frac{1}{5}$	72 58
	Total loss mov'b. stock	$861 63
	To estimated rent of office library, 1870, one year, $5,000.00	
	Pro rata, 52 days, from Nov. 9th, '70, to Dec. 31st, $\frac{1}{5}$, 575.34	115 06
	1871.	
	One year, 5,000.00, $\frac{1}{5}$	1,000 00
	1872.	
	141 days @ 5,000.00, 1,931.50, $\frac{1}{5}$	386 30
	Total rent	1,501 30

In the circuit court of the United States for the eastern district of Missouri.

COCHRAN FLEMING, COMPLAINANT; *vs.* JAMES H. McLEAN, DEFENDANT. } In chancery.

To the above-named defendant:

You are hereby notified and required to produce before the undersigned, master in chancery of said court, a full, just, and true account, verified by your affidavit, stating what number of boxes of pills you, the said defendant, have made and sold since the 9th day of November, A. D. 1870, having thereon or attached thereto the label or wrapper described in the plaintiff's bill as Exhibit L, or the label or wrapper described in the bill as Exhibit K, and showing at what price the same were sold, and at what profit, on the hearing appointed to be had
420 before said master, at his office, number 417 Pine street, in the city of S't Louis, on the 6th day of July, 1874, at 2 o'clock p. m.

JOSEPH SHIPPEN,
Master in Chancery of said Court.

Due and personal service of the above notice by a copy of the same admitted this June , 1874.

EASTERN DISTRICT OF MISSOURI:

George H. Hastedt, being duly sworn, says that he delivered a copy of the within notice to James H. McLean, defendant, June 24th, 1874.

GEORGE HASTEDT.

Sworn and subscribed this 24th day of June, 1874.

JOSEPH SHIPPEN,
Master.

Exhibit No. 1.

In the U. S. circuit court, eastern district of Missouri.

COCHRAN FLEMING *vs.* JAMES H. McLEAN.

STATEMENT.

Number of boxes of pills sold of Exhibit L of plaintiff' bill since Nov'r 9, '70	None.
Number of boxes of pills sold marked "Exhibit K" of plaintiff' bill, 1,231 gross, @ 12.00	14,772 00

D'R.

To 410 gross pills returned, @ $\frac{99}{12}$	4,920 00
421 Expense manufacturing material, &c., on 1,231 gross @ 8.00	9,848 00
Freights and extra expenses on pills returned	115 00
One fifth $\frac{1}{5}$ expenses of printing & paper in advertising—whole expenses one & half year $\frac{1}{5}$)87,000.00	17,400 00
	$32,283 00
Loss incurred by sale of Exhibit "K" of	17,511 00

Plaintiff bill seventeen thousand five hundred & eleven (17,511.00) dollars.

S'T LOUIS, *July* 6, '74.

U. S. OF AMERICA,
Eastern District of Missouri, ss:

James H. McLean being duly sworn, says that the foregoing statement is just and true.

J. H. McLEAN.

Sworn & subscribed to this 6th of July, A. D. 1874.

JOSEPH SHIPPEN,
Master.

Exhibit No. 2.

	Number of boxes of pills sold of Exhibit L of plaintiff bill since Nov'r 9th, 1870	None.
422	Number of boxes of pills sold on acc't, marked Exhibit K of plaintiff bill since Nov'r 9th, 1870, 901[10] gro., @ 14.15	12,750 95
	Number of boxes of pills sent on commission, marked "Exhibit K" of plaintiff bill, since Nov'r 9th, 1870, 474[15], @ $15 96	7,571 69
	Estimated number of boxes of pills marked "Exhibit K" of plaintiff bill, sold for cash and through travelling agents since Nov'r 9th, 1870, 91[6] gross, @ 15.96	1,460 34
	Total sales	21,782 98
	Estimated number of boxes of pills exchanged and returned, including sundry discounts on and of amounts as entered "sales on account," 329½ gross, @ $14.50	4,667 15
	Estimated number of boxes of pills exchanged, unsold, returned, and unaccounted for, including sundry discounts allowed as entered, sent on commission, 311½ gross, @ 15.96	4,972 87
	Material, including waste, for manufacturing and putting up 1,472½ gross, @ $8.40	11,782 67
	Estimated freights & extra expenses on pills returned	115 00

Movable stock acc't.

	Total loss for 1870	1,380 81
423	Pro rata for 52 days, 196.71, ⅕	39 34
	Total loss for 1871, 3,748.57, ⅕	749 71
	Do. do. 1872, 939.50	
	Pro rata for 141 days, 362.93, ⅕	72 58
	Total loss mov'b. stock	$861 63
	To estimated rent of office library, 1870, one year, $5,000.00	
	Pro rata, 52 days, from Nov. 9th, '70, to Dec. 31st, ⅕, 575.34	115 06
	1871.	
	One year, 5,000.00, ⅕	1,000 00
	1872.	
	141 days @ 5,000.00, 1,931.50, ⅕	386 30
	Total rent	1,501 30

Advertising acc't.

Total cost for 1870, 40.00	
Pro rata for 52 days 5.69, $\frac{1}{5}$	1 14
Total cost for 1871 65.50, $\frac{1}{5}$	13 30
Do. do. " 1872 1,850.25; pro rata for 141 d'ys, 714.65, $\frac{1}{5}$	142 93
Total adv. expense	$157 37

Printing & paper acc't.

Total am't for 1870, 33,974.97	
Pro rata for 52 days 4,840.27, $\frac{1}{5}$	968 05
Total cost for 1871, 49,790.80, $\frac{1}{5}$	9,958 16
424 Do. do. " 1872, 55,342.09; pro rata for 141 d'ys 21,378.72, $\frac{1}{5}$	4,275 74
Total expense p. & p. acc't	$15,201 95

General expense acc't.

Total expense for 1870, 25,230.13; pro rata for 52 d'ys, $3,594.42, $\frac{1}{5}$	718 88
Total expense for 1871, 23,876.06, $\frac{1}{5}$	4,775 61
Do. do. " 1872, 25,292.05; pro rata for 141 d'ys, $9,770.35, $\frac{1}{5}$	1,954 07
	7,448 56

Recapitulation.

To estimated am't ret'd, exch'd, &c., sale a/c	4,667 15
" " " unsold, &c., com'n acc't	4,972 87
" material, 1,472$\frac{10}{12}$ gross, @ 8.00	11,782 67
" estimated freights	115 00
" loss movable stock a/c	861 63
" estimated rent	1,501 36
" advertising acc't	157 37
" printing & paper acc't	15,201 95
" expense acc't	7,448 56
	46,708 56
Credit:	
By total sales	21,782 98
Total loss	24,925 58

U. S. OF AMERICA,
Eastern District of Missouri, ss:

425 James H. McLean, being duly sworn, says that the foregoing statement is just and true, as he verily believes.

JAMES H. McLEAN.

Sworn to and subscribed this 15th day of October, 1874.

JOSEPH SHIPPEN.
Master in Chancery.

Master's notice.

In the circuit court of the United States for the eastern district of Missouri.

COCHRAN FLEMING, COMPLAINANT,
vs.
JAMES H. MCLEAN, DEFENDANT.

Notice is hereby given that my report as master in the above-stated case can be seen by them at my office on Wednesday, the 24th inst.; and that a further hearing will be had therein at the same place on Thursday, the 25th inst., at 4 p. m., for the consideration of any objections that may be made thereto.

Dated the 23rd day of March, 1875.

JOSEPH SHIPPEN,
Master in Chancery of said Court.

Due and personal service of a notice, of which the above is a
426 copy, is admitted this 24th day of March, A. D. 1875.

SAMUEL S. BOYD,
Sol. for Def't.
GEORGE DENISON,
Sol. for Plaintiff.

Said testimony taken before said master, and filed with his report, is as follows, to wit:

In the circuit court of the United States for the eastern district of Missouri. In chancery.

COCHRAN FLEMING, COMPLAINANT,
vs.
JAMES H. MCLEAN, DEFENDANT. No. 319.

Testimony taken before Joseph Shippen, the master in chancery of said court, in accordance with the order of court, dated June 4th, 1874.

Present, M. S. Gray, esq., & George Denison, esq., solicitors for complainant, and T. A. Stratton and Samuel Reber, esqrs., solicitors for defendant.

COCHRAN FLEMING
vs.
JAMES H. MCLEAN.

JULY 17TH, 1874.

The parties met before Joseph Shippen, master, and the following proceedings were had:

427 M. S. Gray & George Denison appeared for plaintiff, and S. Reber & T. W. Stratton for defendant.

JAMES H. MCLEAN, being duly sworn as a witness on the part of the plaintiff, testified as follows:

1. Q. (By M'r Gray.) Is that your account filed in this cause? (Showing paper to witness.)

Ans. Yes, sir.

2. Q. Did you make it yourself?

Ans. I had my clerk make it out; I overseed them.

3. Q. Who is he?

Ans. John G. Taylor; I saw his checks; him and another one went over and called off and checked off, and we proved the checks and the account.

4. Q. Called off from what?

Ans. From the journal.

5. Q. I will ask you first about the number of boxes sold of Exhibit L of the plaintiff's bill (a pill-box with red label) since November 9th, 1870; was that result reached by an examination of your books?

Ans. Yes, sir; because I had known I had abandoned it ten years before.

6. Q. In your answer you say defendant first began to use these labels, stamps, and envelopes, Exhibits I and L, as near as he can remember, in the year 1853; defendant is not able to state how many of such were sold, at what average price, and what profit. The period of time
428 such were sold was from 1852 to 1872?

Ans. There is two labels you have there; L is the red label, and that I abandoned in 1861 or 1862.

7. Q. What do you mean in your answer when you say you used Exhibit I and Exhibit L till 1872?

Ans. "I" is the black label, and "L" is the red label.

8. Q. Do you, then, say your answer is incorrect in asserting you used Exhibit L from 1852 to 1872?

Ans. I don't believe I made such an answer as that. If that is my deposition, it is wrong.

9. Q. It is your answer.

Ans. It is wrong. The fact is this: I abandoned that label, I think, in 1864. I used it red, and found the customers objected.

10. Q. State the facts.

Ans. I abandoned the use of that label somewhere between 1860 and 1864, and never printed any afterwards.

11. Q. Did you ever use any afterwards?

Ans. No.

12. Q. You had sold the pills with the red label?

Ans. No; not after that.

13. Q. Prior to that?

Ans. Yes, sir.

14. Q. Had you any out on commission?

Ans. Maybe I had; but I called them all in when I changed my label.

429 15. Q. What do you mean by all? You don't mean those you had sold by actual sale?

Ans. Yes, sir; I called them in, sold or unsold. For instance, yesterday I received fifteen gross of pills, same label you are speaking of, and some of the label of May. I have changed my label since.

16. Q. Then I ask you whether the fact is you did use any of the red label up to 1872? As you stated in your answer defendant first began to use the labels, stamps, and envelopes, Exhibits I and L, as near as he now remembers, in the year 1853; defendant is not able to state how many of such were sold, at what average price, or at what profits; the period of time during which said pills were sold was from 1853 to 1872.

Ans. That is all right enough, but I stopped the sale in 1864.

17. Q. I ask you whether you did not use any of the red label, like Exhibit L, as late as 1872?

Ans. No; I never used them after 1864.

18. Q. Did not you use any of that kind in 1871?

Ans. No.

19. Q. In 1870?

Ans. No, sir; not since 1864; for I destroyed the entire stock.

20. Q. In making this account did you examine your books to see whether you have used any of Exhibit L after the 9th of November, 1870?

430 Ans. I did not need to, because I know positive it was not the case.

21. Q. Did you examine the books?

Ans. I had not, and I did not need to.

22. Q. Then you made no examination in reference to that?

Ans. No, sir.

23. Q. Do you state positively you did not use any of the red label, Exhibit L, after November 9th, 1870?

Ans. No, sir.

24. Q. (By M'r Reber.) You mean to say you did not?

Ans. Yes, sir.

25. Q. (By M'r Gray.) Do you mean to say, D'r, that after you made the change from red label L to the dark label K that you called in all the pills you had sold?

Ans. Yes.

26. Q. How did you get them from the purchaser?

Ans. I swapped them sent by them to me, and got the new pills for the old.

27. Q. So the purchasers returned the original pills they bought of you and took another pill and another label from you?

Ans. Yes, sir; and always glad to do it.

28. Q. The next item—your books show these charges?

Ans. Which charges?

29. Q. In 1864 or '65 when you made the change from the red label to the black label K, you sent out and took up the pills?

431 Ans. There will be credits; for instance, you have 10 dozen of my pills on hand and you should send them back to me by express, and I would credit you with them and charge you with the others. I have seen my books enough to tell, but I can't tell whether that is the case.

30. Q. You can't say whether the books show the exchange or not?

Ans. No, sir.

31. Q. You mean to say, doctor, that every purchaser of pills sent back those he had?

Ans. No; I don't think he did.

32. Q. How came it about that that exchange was made; who started the thing?

Ans. Myself.

33. Q. You notified the parties?

Ans. Yes; I notified them.

34. Q. Notified them what?

Ans. I notified them I was changing off the red label for the black label, and notified my travelling agents to take them up wherever they found them, and substitute my new label for them.

35. Q. In what books would that appear? State the books.

I don't know, sir; we had no sales-book; there would be no sales book about that.

36. Q. In what book or books would it appear?

Ans. It would naturally go in the traveller's returns, I should suppose, but I question whether we would notice it.

432 37. Q. What are the traveller's returns?

Ans. Reports made by them; they have to sell so many pills and return them in a wagon or by express. I charge them with 100 dozen going out. If they return 100 dozen the account is even. The only way I know it, would be that the agent returns the 100 dozen, and I credited him with it.

38. Q. In what shape were those returns; verbal or written?

Ans. Verbal and book returns.

39. Q. What books?

Ans. Books they kept.

40. Q. Those were handed in to you?

Ans. Yes.

41. Q. And those books would show what, if any, had been exchanged?

Ans. Yes, to some extent they would. There would be some discrepancy in this thing. I have not kept these things, as they were both my goods. I would not be so particular as I would with the charge to customers.

42. Q. Have you those return-books?

A. No; after they are passed 12 months we throw them away; we take receipts from the agents and gave them receipts in full of all demands, and there ends all trouble with the agents. I might have them and might not; I can't tell.

433 43. Q. Would those reports, these traveler's reports, embody both commission goods and the goods you had sold by absolute sale?

A. No, sir, not always.

44. Q. How would the goods you had sold when these were exchanged, in what way would they appear?

A. They would be so much cash sale.

45. Q. You have stated that you made a change in the label and requested the parties that bought of you to send the old pills with the old label to you and you would exchange them?

A. Yes.

46. Q. How would the transactions appear in your books?

A. By themselves if they were sent direct, would be naturally a return made.

47. Q. As a matter of fact?

A. If they came from my store they would be charged direct. If sent to the traveler they would be charged direct to him, and that return would have to be credited.

48. Q. In the case of a purchaser he would be credited with the old pills, and the labels returned?

A. Yes, sir.

49. Q. And that party would be charged by what you sent to him?

434 A. Yes. It would not always appear; at that time I was not so particular.

50. Q. When did you begin to be particular?

A. Two years ago. Two years ago I began to be very particular with my travelers and had them make weekly returns.

51. Q. What time two years ago?

A. Only two years ago last spring we commenced it.

52. Q. To go back to the case of the purchaser having goods on com-

mission, I understand you to say that parties that had purchased them sent them back and got new pills, and that transaction would be entered on the books with the purchaser himself?

A. Yes.

53. Q. Credited and charged?

A. Yes, if it went out of my store it would be so.

54. Q. Take the case of those who had your pills on commission. How was the charge made with the commission men?

A. In various ways. I can't explain about the way of the traveler and purchaser. Say here is a man brings in ten dozen. I would exchange ten dozen and would send them to the factory, and the label being changed there would be no charge.

435 55. Q. You mean take off the old labels and put on new labels?

A. Yes, sir.

56. Q. So there is no exchange of pills, but labels?

A. Yes, sir.

57. Q. In case of parties who purchased, you changed the labels and pills?

A. No, never; didn't say so; if you would bring in that box I would give you another box.

58. Q. I understand you to say you changed the pills?

A. No; I changed the boxes and I sold the pills.

59. Q. It was never charged?

A. No; I would take off the wrapper and send it back again.

60. Q. I understood you before to say in case of the purchaser of pills that sent you the pills—pills, labels, and boxes altogether—that you sent them a new article with a new label?

A. Yes, sir; I would take them boxes and label them with a new wrapper and new boxes, and sell them again.

61. Q. The same pill?

A. Yes, sir; I will explain in the case of the red label, that I was very particular to have it all stopped.

62. Q. I don't care about that. The fact I want to get at is whether there were any pills with the red label on that were still in the

436 market after November, 1870; you don't know how that was; whether they had all come in?

A. I don't think there was one in existence; I have been after them as much as the other label that is now out. I recollect of throwing forty gross into the Arkansas River.

63. Q. Yourself personally?

A. Yes, sir; I gave an order to my men. We gave new pills and threw the others away.

64. Q. Exhibit K we come to now. I believe you have already stated this item was made out by your clerk?

A. Two clerks.

65. Q. I understood you said M'r Taylor?

A. There was a young man that checked off with him; he couldn't do that alone.

66. Q. What was his name?

A. Ernst, a clerk; I can't tell his last name; I know them by their first names.

67. Q. One calls off from your books, and the other checks?

A. Yes; and then they swap, and the other checks.

68. Q. So they alternated in their duties?

A. Yes, sir.

69. Q. What part did you take?

A. I was sitting by; I heard them call; looked at it to see they did it correct.

437 70. Q. When did they begin?

A. They commenced on the 9th of November and ended on the 21st day of May of the following year. That is from recollection. I had the decree, the notice of the decree, that I should examine the book.

71. Q. The number of boxes of pills sold marked "Exhibit K"—1,231 gross at 12 dollars, 14,772 dollars—there is no date there. When did you begin?

A. The 9th of November, 1870.

72. Q. On what day did that examination end?

A. On the 20th day of May, 1872. I believe it was the 21st.

73. Q. Do you know?

A. The day I changed my labels, for I sold not a dollar's worth afterwards.

74. Q. You mean to be understood, then, that that run from the 9th day of November to the 20th or 21st of May, 1872?

A. That is the time I ended selling K.

75. Q. Why didn't you state it in your account?

A. I can do it yet, so far as that is concerned.

Q. How is that result arrived at; what were the items?

438 A. Every sale is marked in my journal, so every commission is marked in my journal; every dollars' worth that goes out of my store goes on my journal; everybody knows that.

77. Q. Your journal will show every sale of pills made from the 9th of November, 1870, to the 21st day of May, 1872?

A. Yes, sir.

78. Q. Your journal will show all those sales?

A. Yes, sir; there is no question about that.

79. Q. Does it show all that went out on commission?

A. Yes, sir.

80. Q. Any that went out on commission, were they ever returned?

A. Yes, sir.

81. Where will that appear?

A. In the agent books, and those that got in, and the returns are made in that way.

82. Q. Will those returns appear on your journal?

A. Not always they would not, as I have stated to you; it is a moral impossibility; being the owner of the pills myself, I didn't make exact returns; sometimes swapped off, and sometimes exchanged four or five gross to a party that had them and returned them afterwards.

439 83. Q. Do they generally appear?

A. Generally they appear in the journal.

84. Q. If not all, which ones do not?

A. I can't tell you, it is too long ago.

85. Q. What kind of returns would not appear in your journal?

A. If I was selling, as I stated, a merchant in New York—if I had shipped him twenty gross of them pills, if there was no other charge on the book, I would return 20 gross to him and make no charge but a bill of lading; that would be the idea.

86. Q. Then you mean to say that class of cases would not appear when you only had one transaction with a man?

A. That would be the way. I had no partner then, and when we exchanged even I paid freight on them. I did the best I could to swap them without any interest whatever.

87. Q. I am talking about the pills left on commission that were returned you. Do you mean to say every case of return was a case of swapping?

A. Yes, sir.

88. Q. No pills were returned unless you swapped off for them?

A. Yes, sir; we just swapped the new label for the old.

440 89. Q. Does this item, stating the number of gross in Exhibit K, cover all cases of sales and all cases of goods out on commission?

A. Yes, sir. Everything that went out from the store was marked down. They were charged either on commission or sale.

90. Q. Marked on the journal?

A. Yes, sir.

Then it became a matter of merchandize?

91. Q. How were they marked down?

A. Charged.

92. Q. For instance, you sell a number of pills, they are marked what?

A. As a sale, so much cash pills, so many dozen.

93. Q. Suppose strengthening cordial?

A. So many dozen Strengthening Cordial.

94. Q. Your journal will show every kind sold?

A. Yes, sir; I had five pieces of goods, Cordial, Liniment, Vermifuge, Chinodine Sugar Pills, and Universal Pills.

95. Q. And each article of goods was marked by the proper name?

A. Yes, sir; if Universal Pills, so much of that.

96. Q. You had another pill.

A. Yes, sir

441 97. Q. And that would be so marked that you could distinguish them?

A. Yes, sir. The price is so different you cannot keep marking them so.

98. Q. This was the fact then, supposing you sold a dozen boxes?

A. Yes; or suppose I sold a half-dozen.

99. Q. Where was it entered?

A. In the journal.

100. Q. Supposing you sold one box?

A. It would be in the same way; the cash would never run unless we did it. I have hunted half a day for 25 cents to make the cash balance. You must have it balance.

101. Q. Did you ever sell pills out of your store by the box or half-dozen boxes?

A. Yes, sir.

102. Q. Were those all entered in your journal?

A. Yes, sir, and a bill rendered for them.

103. Q. Did this item embrace all the individual boxes sold?

A. Yes, sir; everything I know of. I may have given some away myself in some foolish, outlandish way I don't know of; but that is all I know of. My journal shows all the cash that comes in and all that goes out, that I know of.

442 104 Q. Do your books show the price at which the goods were sold or sent out on commission?

A. Yes, sir.

105. Q. What do they show in reference to the prices as to commission-goods?

A. The same way.

106. Q. When you enter the commission-goods you don't know whether they are sold?

A. No; when we come to collect of you the price is entered; for instance, we take account sales the first of every year; the account of what is out, we net them, and what they cost we net them, and what the cost would be; the expense of sales if I sell them at 15 dollars and it cost me 3 dollars to get them, I net it at 12.

107. Q. When commissioned goods were sent out, what price, if any, was charged?

A. From 1.25 to 1.50 and some 1.65, some 1.75, and some 2.00, according to agreement when put on commission.

108. Q. Do you mean by the dozen?

A. Yes; we don't retail any.

109. Q. At the time they are sent out they are charged on the journal at the price you hold the party to account for?

A. Yes, sir.

110. Q. Suppose those goods are sold and there has to be another return for commission-goods to know what has been wholly obtained for them?

443 A. There is two ways of settling a commission-account. If I sent a traveler there to settle up the account, and he found there's two boxes sold, he would charge him with the two boxes at the price agreed on.

111. Q. Between whom?

A. Between the agent and the travelling agent, or between the agent and me.

112. Q. You say they are charged on your journal at the price agreed on; who was the price agreed on with?

A. Between the local agent and myself.

113. Q. You fix the price?

A. He may object; and if I chose I may reduce it.

114. Q. Suppose I were to buy of the local agent and you were to deposit a lot of pills with me, and we would agree on the price and I would sell them at any price I pleased, where does my profit come in?

A. In what you sell for.

115. Q. I have to pay you so much and I make the profit. You don't pay the commission-man so much, but you deliver them at a certain price and they make the profit by selling over that?

A. Yes, sir.

444 116. Q. That entry is made when the goods are sent to the agent, showing the price at which they are commissioned to him?

A. Yes, sir.

117. Q. When do you ascertain what has been sold, and at what prices? Where is the entry that shows what you have realized?

A. The entry would be from the returns of the traveling agent.

118. Q. How does that cut any figure?

A. I send my travelling agent out and he *he* goes and sees you and collects all that has been sold.

119. Q. You don't deal directly with your local agents?

A. Yes.

120. Q. He don't make returns to you; he makes returns to your traveling agent?

A. He does to me; I have changed my method now.

121. Q. I am talking between November and May 20th, 1872?

A. We dealt through my travelling agent. I had my traveling agent go and see them and collect from them all that was sold.

122. Q. The commission man don't make returns to you, but to the traveling agent?

A. Yes.

445 123. Q. You don't deal directly with your local agent?

A. Yes.

124. Q. When these returns were made from the traveling agent, where and how would the result of the venture appear on the books?

A. My traveling agent would show. He would make so many returns, so many collections on such receipts, and the amount of the returns would be entered up against them. I would send him a thousand dozen pills or 5,000 dozen, and the man would show how much he had sold, and the balance he would collect. If he had a 100 dozen and sold two and sold two of liniment, it would be in that receipt merely entered on the back of the receipt so much money collected from that receipt.

125. Q. That receipt still remained in the agent's hands?

Ans. Yes, sir.

126. Q. The thing I was trying to get at was this: this return, when made by the travelling agent, how it appeared here?

Ans. They never appeared here. When we commission, the journal entry is made, then we have a receipt, and we make you sign a receipt, & when that is returned we destroy the journal entry; this is the

446 receipt we have received there: J. H. McLean, so much through Tom Johnson, for which we agree to pay J. H. McLean the price, whatever it is, and he signs it.

127. Q. Then your books don't show your commissioned goods at all?

Ans. No, sir.

128. Q. Have you got any entries to show what you do realize from your commissioned goods?

Ans. Only the returns of the travellers and the receipts.

129. Q. Are there no entries in the books?

Ans. We have the returns of the traveler.

130. Q. Do they show the receipts of the whole of the goods?

Ans. The receipt being gone there must be something to take the place of it.

131. Q. I ask for commissioned goods. Have you anything to show what you have sold them for?

Ans. We can only show that by the returns of the traveler.

132. Q. And they entered on your books when returned?

Ans. As so much returned & so much sold.

133. Q. Do your books show how much money has been realized on commissioned goods that have been sold?

447 Ans. I cannot answer that in that way. If I send a receipt for a box of pills for 25 c'ts, cordial one dollar, & a bottle of liniment seventy-five cents, and we find you have only sold one box for 25 c'ts, he returns your receipt, received 25 c.

134. Q. What do you enter in the books?

Ans. As soon as it comes in the receipt it is kept there & taken from my books.

135. Q. Don't you make any entry in the books?

Ans. The agent is charged with 25 c. on the receipt.

136. Q. The books show that?

Ans. Yes, sir; & we make an entry showing the cost, 20 c. for that, & that leaves 5 c.; we charge him so much, & we can see exactly what the traveling agent has done, whether he has lost money or saved money. I hold M'r Shippen's note for ten dollars; he don't pay it all off & he pays me two dollars, & my travelling agent goes for it, and charges me the

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expense—charges me his salary—& my travelling agent goes there and he charges me with the expense of going there, the expense of collection, staying over night; he charges for the salary sometimes—one overtops the other. That is the way the entry comes sometimes.

448 137. Q. To come back to the question of what your books will show as to the receipts obtained by you on commissioned goods sold, I understand you to say that whenever a traveler or local agent makes returns of what he has sold you make an entry in your books of what commissioned goods have been sold & what you have received for it?

Ans. Yes, sir.

138. Q. It is true your book will show what you received in money for commissioned goods sold as well as what you received for absolute sales?

Ans. Yes, sir.

Q. What books showed that?

Ans. The journal. The return from the agent of his cash it must be entered there because it must come in in the cash.

139. Q. When these returns are made, do your entries show the gross amount, and then the expenses connected with it, & then the net result, do they all appear together, or how do they appear?

Ans. They appear together so much expense.

140. Q. The entry would show what the commissioned goods had sold for without regard to expenses?

Ans. Yes, sir.

449 141. Q. The entry would show what the expenses connected with it was?

Ans. Yes, sir; & then it would show in the third place what the net result was of the commissioned goods, what the debit and credit would be.

142. Q. Are the entries all made together of the gross sale with the accompanying expenses?

Ans. Yes, sir; when the traveler makes the returns it is entered in that way.

143. Q. This traveler looks after all kinds of goods you have for sale?

Ans. Yes, sir.

144. Q. Do you separate the expenses relating to each kind of goods, or is the expense in gross for all?

Ans. Yes, sir; I own them, & it comes together.

145. Q. How do you tell what expense is applicable to any one kind? For instance, the Universal Pills, does that appear in your books—is there a separation in your books?

Ans. No, sir; they are all alike to me; one is as much expense as the other. I am running the one as hard as the other.

146. Q. I understand you to say your books will not show what was the proper expense of any kind of goods, but shows the gross expense?

450 Ans. Yes, sir; shows the business.

147. Q. Take a case where a commission man had Chin'idine Pills, Universal Pills, Strengthening Cordial, Vermifuge, & Liniment; supposing he has all those five out on commission, he makes the returns showing so much liniment sold, so many Chin'idine Pills sold, so much Vermifuge sold, but no sale of Universal Pills, and the expense of his trip is so much.

Ans. We make no isolated cases; if a man goes out and collects a

thousand dollars we don't say it is for the Universal Pills; it is a thousand dollars in the business.

148. Q. If he has not collected any on the Universal Pills you would say no expense should be charged to the Universal Pills?

Ans. Yes, sir.

149. Q. You charge it up to that if none are sold?

Ans. Yes, sir; because he might sell some of it the next time.

150. Q. You charge expense to the Universal Pill whether any are sold or not?

Ans. Yes, sir; it is one business; one is mine as much as the other; we make no isolated cases.

151. Q. What were the book or books your clerk examined to make out this item?

451 Ans. The journal; that is the book all entries are made in; no other book could come in.

152. Q. That was the book examined, and the only one?

Ans. The only one required to be examined.

153. Q. Did you follow that along from November 9th, 1870, to May 21st, 1872?

Ans. No, sir; personally I did not.

154. Q. You took the report then of your bookkeeper & his assistant?

Ans. As I heard him call it out I examined it occasionally, to see if they were going right, to see if the proper entries were made and called off.

155. Q. Were you present all the time?

Ans. I may have been out a few minutes. I was right at their hand & could hear every word they called off.

156. Q. They set down the items?

Ans. Called off the items.

157. Q. Set down the items?

Ans. Yes, sir; then having gone through with the whole period of time, I found all the items.

158. Q. How did they get at 1,231 gross?

Ans. Added them up; I saw it and checked it.

159. Q. Did that include odd boxes, single boxes, or two or three or four boxes?

452 Ans. All the boxes sold we know of; for no cash can come into our store unless it is entered on the books.

160. Q. Have you a wholesale price for your pills?

Ans. Yes, sir.

161. Q. And a retail price?

Ans. Yes.

162. Q. Are they the same, or different?

Ans. All the same pretty much; they are different.

163. Q. Which way do you mean to have it?

Ans. We vary, according to circumstances.

164. Q. Then you have not a uniform price?

Ans. No, sir.

165. Q. Is your wholesale price and your retail price the same or different?

Ans. The retail price is different. I don't sell any retail worth speaking of.

166. Q. When you sell a single box?

Ans. That is only one box a week sometimes.

167. Q. You sometimes sell single boxes?

Ans. Yes, sir.

168. Q. What is your price?
Ans. 25c.
169. Q. Do I understand you to say you have not or have a uniform price wholesale?
Ans. No, sir.
453 170. Q. I am now speaking of the period from November 9th, 1870, to May 21st, 1872. I understand you to say that is what you mean, to bring it down to May 21st, 1872.
(By the master.) Do you keep your books double-entry?
Ans. Yes, sir.
171. Q. (By M'r Gray.) Then you have no uniform wholesale price?
Ans. No, sir.
172. Q. What are the ranges of the wholesale price? What were they prior to this suit?
Ans. From nine dollars to fifteen or sixteen dollars.
173. Q. You' entries in your books in every instance show at what price you sold wholesale?
Ans. Yes, sir.
174. Q. If for nine dollars, that price appears?
Ans. Yes, sir.
175. Q. If ten or fifteen or sixteen dollars, that price appears?
Ans. Yes, sir.
176. Q. Then your book will show exactly to a dollar what you realized from the sale of those pills?
Ans. Yes, sir.
454 177. Q. Why have you in your account averaged the price at twelve?
Ans. Because I have taken the low prices & high prices & averaged them.
178. Q. This item of your account is not the exact price that you received, but it is an estimated average?
Ans. An actual average.
179. Q. Do you mean to say you added up all you sold?
Ans. Yes, sir; I added up—that is to say, I told M'r Taylor to do so.
180. Q. Do you know whether he did so?
Ans. I looked at him, and saw him.
181. Q. You had it on your books, and this party must have taken down on paper the exact price in dollars and cents all the way through?
Ans. Yes, sir.
182. Q. And the exact number of gross*es*; the number of pill boxes sold?
Ans. Yes, sir; gone out of the store.
183. Q. Did the pills come to just even gross, 1,231 gross?
Ans. Just as they footed up.
184. Q. No fraction?
Ans. They footed it up, & it came to just exactly that amount.
455 185. Q. Did you stop on your books with the 21st May making this estimate?
Ans. Yes, sir; for I sold none afterwards with that label.
186. Q. You had commissioned goods out—sent out prior to that date?
Ans. Yes, sir.
187. Q. Were not those commissioned goods sold?
Ans. No; we got back a large portion; charged all that went out, & credited all that came in.
188. Q. You mean there were none sold of the commissioned goods

that had been sent out prior to the 20th May, 1872. You mean to say there were none of those goods outstanding in the hands of commission-men & agents which were not sold?

Ans. Suppose I sent you two dozen pills, that is the charge which is embraced in the 1,230 gross; if you returned any, it is credited.

189. Q. After the 21st?

Ans. Yes, sir.

190. Q. Then you must have come back down lower?

Ans. No, sir; I charged all that went out, and if I got a return, I credit it. Suppose I sent you out two dozen pills the day before, I have it charged in the 1,230 gross.

456 191. Q. Then you must have examined the books later than the 20th May?

Ans. No, sir.

192. Q. Had you any pills out in the hands of agents then?

Ans. Yes, sir; they were in the hands of agents in that 1,231 gross.

193. Q. You have treated all that were sold in that way?

Ans. Yes, sir.

194. Q. Were any returned after the 20th May?

Ans. Yes, sir; yesterday I had some returned.

195. Q. You had to examine your book to find what was returned?

Ans. Yes, sir; I know all I sent out, & I credited all I got back, as near as I could.

196. Q. You have examined the books after that day?

Ans. No; I ceased on the 21st.

197. Q. Suppose there were one hundred gross in the hands of the agents on the 21st May; some undoubtedly were sold, and some were returned; if returned, they were returned subsequent to the 20th of May?

Ans. No; they were returned afterwards.

198. Q. In order to ascertain the returns, you had to examine back to a later date than the 21st May?

Ans. Yes, sir.

457 199. Q. I understand you to say you stopped examining your books on the 21st?

Ans. That was in regard to pills sent out.

200. Q. In this statement have you accounted for all the pills in the hands of commission men on the 21st May?

Ans. Yes.

201. Q. Where does that accounting appear?

Ans. In the books.

202. Q. Did you deduct it from this 1,231 gross?

Ans. No, sir.

203. Q. How are they accounted for?

Ans. My books show 1,230 gross gone out between these dates. For instance, I send out one hundred gross between those two dates when we go and see if they are sold and none are sold.

204. Q. Have you got back all you had out on the 21st May?

Ans. No; I am getting them back all the time.

205. Q. These 1,231 gross represents what you sent out after the 9th of November, 1870, and before the 21st May, 1872?

Ans. Yes, sir; nothing to do with the credits whatever.

206. Q. What quaatity of pills were out in the hands of commission-men on the 9th November, 1870?

458 Ans. I could not tell you that.

207. Q. You had pills out in the hands of commission-men that day?
Ans. Yes, sir.
208. Q. That you had sent out on commission before?
Ans. Yes, sir.
209. Q. Then you don't know, or do you, how many of the commissioned goods that were sent out had been sent out prior to the 9th November, 1872, were sold after that time?
Ans. No, sir.
210. Q. Your books will show?
Ans. No, sir.
211. Q. Won't your books show what you sent out prior to the 9th November, 1870?
Ans. I don't know; I have not examined.
212. Q. You state your journal contained everything sold & everything commissioned?
Ans. Yes, sir.
213. Q. When did you commence to keep that journal?
Ans. Somewhere about 1860.
214. Q. And it would show everything from 1860 as exactly as from the 9th November, '70?
Ans. Yes, sir.
459 215. Q. Then your books will show how many Universal Pills you had sent out to commission-men prior to November 9th, 1870?
Ans. Yes, sir.
216. Q. And your books will also show what proportion of those commissioned goods that had been sent prior to the 9th of November, 1870, had been returned or sold?
Ans. Yes, sir.
217. Q. Then your books will show how much of the commissioned goods that had been sent out prior to the 9th of November, 1870, had been sold?
Ans. Well, my traveling agents' books would make returns of what had been sold.
218. Q. I understand that was entered in your journal?
Ans. The sales and the cash was entered in the journal.
219. Q. Have you any idea of what quantity of pills you had in the hands of commission-men on the 9th of November, 1870?
Ans. No, sir.

By M'r Denison:

Won't your books show that?
Ans. No; my receipts may.
220. Q. I mean books & receipts.
Ans. No, sir.
460 (Defendant's counsel objected to this as not being a legitimate inquiry.

The master overrules the objection, & rules the plaintiff is entitled to account for all the pills which were sold by the defendant subsequent to November 9th, 1870, & such as were in the hands of commission-men subject to return at that time, all to be accounted for.

To which defendant's counsel then and there excepted.)

221. Q. Can you ascertain from your books what pills with label K on were out in the hands of commission-men on the 9th of November, 1870?

(Counsel for defendant objected to the question as irrelevant & incompetent, maintaining the account should be confined to the question of pills made and sold after that date.

The master overruled the objection, & exceptions were taken.)

Ans. No, sir.

222. Q. Will not your books show what you had sent out on commission prior to that day and had not at that date been accounted for?

Ans. No, sir; I don't think it will.

223. Q. Then it is not true that prior to that date that your
461 journal or any other book showed all the goods sent out on commission?

Ans. Yes, sir; the very moment it is charged to the party taking it; and if he gives a receipt it is removed: it is credited by bills receivable. I could not find all the receipts; they have been destroyed, it having passed into the receipt-book; all the receipts have been destroyed. I counted how many gross of pills I sent out in 1860, but I can't tell only by the returns.

224. Q. Do you mean 1860 or 1870?

Ans. I mean 1860, because you are going back into 1860. I changed my label into K. You want to go back prior to Nov. 9th, 1870.

225. Q. I have not said anything about 1860.

Ans. I don't think I will account from that date when I changed my label. I can only tell how much was out and how it went out and how much I received, but I can't tell until I went back to the change of my red label how much went out.

226. Q. Will not your books show?

Ans. Most assuredly.

227. Q. And how many had been accounted for up to the 9th of November, 1870?

Ans. No; I don't think they can, because I would have to go back for 1860, because I have sent out some to exchange for the red
462 label from 1864. I changed to the black label; I sent out for the red label to exchange for the black label. I would have to charge all the black labels and credit the others.

228. Q. In 1864 or 1865 you began your dark label?

Ans. Yes, sir.

229. Q. Then you have not anything to do with 1860?

Ans. Yes, sir. I merely mention an instance between certain dates.

230. Q. Your books would show exactly when you made that change?

Ans. No; I never make any entries of that date. We are constantly making changes—damaged pills and all that, and sending them off.

231. Q. Were not the transactions, the sales or returns, that were noted in the receipts that you hold of the commission-men entered in some one of your books?

Ans. No, they were not, because they came in in bulk from my travelers. Prior to 1872 I had my travelers settle up all those receipts. I had but little then on commission. I was not doing a commission business till 1872 and 1873. 1873 was the first year I did commission
463 business largely. Prior to that time I had very little on commission; it was principally sales.

232. Q. Do you mean to say you have not got any books that will show what commission goods had been sent out prior to Nov. 9th, 1870, that had been accounted for after that date?

Ans. No; no book in the world.

233. Q. You have stated your journal does show that?

Ans. Yes; ever since I changed my label I have a date to go by. Prior to that I have not.

234. Q. Do you mean to say you had no goods out on commission?

Ans. Yes, sir; but I have no way of accounting for what would be

sold or unsold. I have an account of a number of receipts, but whether that would be proper or not, a receipt may run for three or four years.

235. Q. Prior to the 9th of November, 1870, your journal would not show what you sent out on commission?

Ans. Yes.

236. Q. Would it not show what parties and what dates?

Ans. Yes, sir.

237. Q. And in what quantities?

Ans. Yes, sir.

464 238. Q. And at what price they were charged to the various parties?

Ans. Yes, sir.

239. Q. You don't get any money when you send out on commission?

Ans. Sometimes we get money on account.

240. Q. If you do, that is credited at the time?

Ans. Yes, sir.

241. Q. When you get money it is credited on the books?

Ans. Yes, sir.

242. Q. If you get any at the time you send, it is credited in one entry, is it not?

Ans. No; the credit would come through the traveling agents.

243. Q. I asked you whether you got any cash at the time you sent goods out on commission, and you said sometimes you did; in these cases where you got cash, the cash was credited in connection with the charge?

Ans. No; when the receipt is signed.

244. Q. Then that money would not figure in the books?

Ans. In the receipts of the travelling agent

245. Q. Is it not entered in your books?

Ans. In the return of the travelling agent.

246. Q. Is that a book?

Ans. It is, the travelling agent's; a return book.

465 247. Q. Is that a book he carries or do you keep the book?

248. Q. When they bring in money, don't you credit that money?

Ans. Yes, sir.

249. Q. In what book?

Ans. Credit it to the traveler; I am talking of the traveler. The very moment I get the receipt I charge it and send it out by the travelling agent to collect it. I charge it to the travelling agent and not to the commission-man.

250. Q. When your commission goods are sent out they are charged to the man that takes them?

Ans. Yes, sir.

251. Q. And the price and quantity?

Ans. Yes, sir.

252. Q. That shows so much goods sent out?

Ans. It is one receipt; it is just the same as a note.

253. Q. When you get a commission man's receipt you credit him with the amount of goods left in his hands?

Ans. Yes, sir; as a bill or note, as though it was paid.

254. Q. But, then, you turn around and charge it to the travelling agent?

Ans. Yes, sir; we give him the note and charge him with it.

466 255. Q. When he makes his return of money or goods, if he don't get any goods he has to take the goods?

Ans. No; he has to leave it there. Suppose M'r Gray has got two boxes of pills: he has sold one box, and I get sixteen or twenty cents, and I give up the receipt and return the money as so much from M. L. Gray.

256. Q. Then your books will show what is received?

Ans. In bulk, not in detail.

257. Q. Your books will show it as coming from the travelling agent?

Ans. Yes, sir.

258. Q. So your books show what was received from goods?

Ans. No, it is not true; it shows it in bulk.

259. Q. It don't show how much you got for the pills or liniment?

Ans. No.

260. Q. But only so much in general receipts?

Ans. Yes, sir.

261. Q. And you don't know whether pills sold or vermifuge?

Ans. No, sir; we get two dollars from M. L. Gray, and it is entered up in the receipts.

262. Q. If I have other goods, I give a receipt for the goods?

Ans. Yes, sir.

467 263. Q. And comparing that with the first it would show what was left?

Ans. Yes, sir; but it was not done then. We know the aggregate amount that comes back. I could not identify it because it is in bulk, and the whole five medicines in one receipt.

264. Q. The goods outstanding you have receipts for now?

Ans. Yes, sir; but the goods I had in 1865, in 1868, & 1869 I have not got; it is a moral impossibility to account for them goods.

265. Q. Have you got any receipts of commission men for goods that were sent out prior to the 9th November, 1870?

Ans. I don't think I have.

266. Q. You think you have not?

Ans. Yes, sir; I don't know.

267. Q. If you have not, are not all the goods that were sent out prior to the 9th November paid for?

Ans. No, sir; didn't I tell you if I have a box of pills I got a receipt?

268. Q. Don't you preserve the receipt till the goods are accounted for?

Ans. Yes, sir.

269. Q. Then, for all goods put out prior to the 9th November, you have receipts for them; or they have been accounted for by sales

468 or returns?

Ans. Yes, sir; they have been all charged to the new label, not excepting one that I know of.

270. Q. You mean even those you have sold?

Ans. Yes, sir, certainly, most assuredly, I don't mean anything of the kind. I have made a new label since 1872 & swapped them off. I had a new label six weeks ago. I am changing all over the country.

271. Q. Have you any renewal receipts for goods sent out or pills, Universal Pills, prior to the 9th November, 1870, where a part had been accounted for & you have taken new receipts?

Ans. No; I think they are all up and changed into the new label.

272. Q. You mean 1872 you sent out and got in what was in the hands of commission merchants as well as what you had sold absolutely; you got them in and put on new labels & sent them back again?

Ans. Yes, sir.

273. Q. You say changed; you me'n the same pills are out with the new label on them ?

Ans. Yes, sir.

469 274. Q. In making out this account, the item of 1,231 gross, did you take into account those pills you had sold prior to that date & which after the changing of your label on the 21st May you sent for and put new labels on ; did you take this into account ?

Ans. No; I only took into account as the decree says, between the 9th November & up to this date.

275. Q. If I understand you, when you made a change of labels on the 21st of May, 1872, if I had bought ten gross of the Universal Pills you would send to me & ask me to send them in & put on the new label ?

Ans. Yes, sir.

276. Q. If I assented to that, you did so ?

Ans. Yes, sir.

277. Q. So that ten gross counted in to make this 1,231 gross ?

Ans. No, I only accounted for the number of grosses from the 9th November.

278. Q. You have already stated when you made the change of label, on the 21st May, you asked not only the commission-men to send in the old label, but you asked the men who bought to send them in and let you put on the new label ?

Ans. Yes, sir.

279. Q. And some of them did so ?

470 Ans. Yes, sir.

280. Q. What I want to know is whether the pills this purchaser sent in for you to put on the new labels are counted in to make the 1,231 gross ?

Ans. No, sir.

281. Q. Do you understand me ?

Ans. Yes, sir.

282. Q. Supposing I as a merchant on the 1st of May had bought ten gross and paid you cash.

Ans. Yes, sir.

283. Q. And they had the label Exhibit K on them.

Ans. Yes, sir.

284. Q. And you saw fit on the 21st May to change my label, you send to me and want to put on your new label on the pills I bought, I permitted it to be done, & it was done, and hereafter I sell them with the new label on ; did you count that ten gross as sold to me to make up the 1,231 gross ?

Ans. No, I didn't count it at all.

285. Q. Can you state on what quantity of pills sold prior to the 20th or 21st May, 1872, you changed the label by putting on your new label then adopted ?

471 Ans. I should think between 430 and 500 gross as near an estimate as I can make.

286. Q. Then *don't* 430 or 500 gross on which the labels are so changed are not counted in to make the 1,231 gross ?

Ans. No, they are deducted from it.

287. Q. I ask you whether the 430 or 500 gross that had been sold prior to the 20th or 21st May, 1872, and on which you sold the label, by putting on the new label, whether these gross are counted in to make the 1,231 gross ?

Ans. They are originally counted in.

288. Q. Are they counted in in this account ?

Ans. Yes, sir; and afterwards deducted.

289. Q. That is what you mean to say, that the 430 or 500 gross on which you put the new label about May 21st, 1872, that those gross were counted in to make up 1,231 gross & afterwards deducted?

Ans. Yes, sir.

290. Q. Do you mean to say these 410 gross you speak of as being returned are the ones you changed the labels on?

Ans. I claim that there was more than that, but I have no evidence of the fact.

291. Q. Then you are mistaken in your first answer in saying they were not counted in?

472 Ans. There is no question I have answered that way. I say they were not counted in; they were deducted.

292. Q. I ask you if they were counted in to make the 1,231 gross?

Ans. I got back so many gross and I have relabeled that 430 gross; that was deducted in order to answer the master in chancery.

293. Q. I ask you, supposing you had sold ten gross to me with the label K on and I had paid for them and taken them to my store?

Ans. Yes, sir, that is included.

294. Q. Your answer is you didn't count them in?

Ans. No; that was prior to the 9th November.

295. Q. We are not talking about the 9th November. I am talking about the 21st May; my supposition is prior to the 21st May.

Ans. That is included, of course.

296. Q. You said before, it was not.

Ans. It was as I have stated; every sale it is entered on my books; 1,230 gross is entered on the books, the 430 or 500 gross & relabeled & sent out again and it is deducted.

473 297. Q. Do you mean to say this 410 gross which you have marked here as being returned are the 430 or 500 gross that you had sold prior to the 20th or 21st of May?

Ans. Yes, sir.

298. Q. And which, at your request, were returned by the purchaser to be relabeled?

Ans. Yes, sir.

299. Q. It represents that?

Ans. Yes, sir; sold on commission sent out of the store.

At this point the witness desires to correct his answer made to the question, "Supposing I, as a merchant, on the 1st of May bought ten gross & paid in cash, & they had Exhibit K on them, and you saw fit on the 21st May to change your label you sent to me, & went to put the new labels on the pills I bought, and I permitted it to be done, & it was done, & hereafter I sell them with the new label on, did you count that ten gross as sold to me to make up the 1,231 gross?" by saying, I did count them in.

At this point the hearing was adjourned until 2 o' p. m., this afternoon.

474 2 O' P. M.

James H. McLean.

Examination resumed.

300. (By M'r Gray.) Of the quantity that you have mentioned here as returned, I understand that the 410 gross covers what you put new labels on at the time you made the change in the labels in May, 1872?

Ans. Yes, sir.

301. Q. What proportion of that quantity were pills you had sold and got your pay for?

Ans. I could not tell that.

302. Q. Have you any idea?

Ans. No, sir; I have no idea; I cannot form an idea.

303. Q. Won't your books show?

Ans. No.

304. Q. In making out this account how did you get your 410 gross?

Ans. We took one-third of all that we sent out during the three years; 35½c was returned for change of labels or spoilt.

305. Q. Is that the way you got the four hundred and ten gross?

475 Didn't I understand you to say this four hundred and ten gross which you put here as returned were pills that you called in after you made your change of label & put your new label on?

Ans. Yes, sir; estimated on the amount of pills we sold during the time we sent them out?

306. Q. This is altogether an estimate?

Ans. Yes, sir.

307. Q. You didn't get that from your books?

Ans. No, sir.

308. Q. Why didn't you take it from your books?

Ans. Because no man living can do it.

309. Q. How did you mark an estimate?

Ans. Because we had former years, & we know it more than the average one-third. I am talking of the 410 gross. It is one-third of the 1,230 gross.

310. Q. Have you not said that that four hundred and ten you called in & put new labels on?

Ans. Yes.

311. Q. You had an experience in it before?

Ans. Yes, sir; when we changed the black label to red label, & since we changed those to the cross-bar.

476 312. Q. Do you keep an account of your labels?

Ans. No, sir.

313. Q. Did you keep an account of the red labels?

Ans. No, sir.

314. Q. And black labels, Exhibit K?

Ans. No, sir.

315. Q. And the label you adopted in May, 1872?

Ans. No; kept no account of labels.

316. Q. In making your estimate in May, 1872, as I understand it now, to be an estimate for the quantity you relabeled; you based it upon your experience in 1864 or 1865, when you changed from the black label to the red label?

Ans. Yes, sir; and the other arrangement.

317. Q. What other arrangement?

Ans. I have changed my label again. I stated I had two experiences. I have changed my label twice.

318. Q. In 1864 was one change?

Ans. Yes, sir.

319. Q. And 1872 was another change?

Ans. Yes, sir; & I changed it about four months ago, and I
477 know from that experience and the former experience there is over one-third returned to me.

320. Q. Then you based your estimate in part on the change you made in 1872?

Ans. Yes, sir; and the change in the red label in 1864.

321. Q. How were your labels printed?
Ans. By lithograph.
322. Q. Who does it?
Ans. I have it done in the store, so much apiece. It is so much a week.
323. Q. How long has that been the case?
Ans. That has been about, I think, somewhere about seven or eight years.
324. Q. Where did you get them printed before?
Ans. Where I could get them the cheapest, by engravers or lithographers.
325. Q. When did you begin engraving them yourself?
Ans. I have forgotten.
326. Q. Don't your books show?
Ans. No, sir.
327. Q. When you bought labels, won't your books show?
Ans. No, sir; we paid then so much a pull.
328. Q. I am talking about the labor.
478 Ans. If I paid Alex. McLain so much a pull, it is so much; and for every two hundred and forty pulls it is so much, whether I paid to Tom Jones or anybody else. I have changed my lithographer in the store, and raised their wages and lowered their wages. If it was necessary, I think I could find out very near the time I commenced printing in my store.
329. Q. Have you not looked that up in working up the account?
Ans. No; I had no use for it.
330. Q. Where did you sell your pills from November, 1870, to May, 1872?
Ans. I could not tell you, sir; all over the land.
331. Q. Then you can tell, if it all over the land.
Ans. If that is an answer; I thought you wanted to itemize it.
332. Q. Won't your books show where you sold?
Ans. Yes, sir.
333. Q. You have it in your power to ascertain?
Ans. Yes; I have by looking over. I think I could ascertain the places where it was sold.
334. Q. Did you sell any in Texas?
479 Ans. Yes; I think I did; very little; I didn't travel in Texas then.
335. Q. Any pills sold in Texas returned in 1872?
Ans. Yes, sir; in 1872 I think I started my traveler in Texas. In 1872, 1873, and 1874 I sold there. I traveled there more effectually than anywhere else.
336. Q. Would not your books show what you got back from Texas for the change of label?
Ans. No.
337. Q. Have you looked to see whether they would or not?
Ans. No, sir; I know they would not.
338. Q. Your books would show what you sold in Texas, wouldn't they?
Ans. Yes, sir; I am still getting them back to day. Three days ago from Texas I got them back.
339. Q. A dozen?
Ans. A box of a dozen.
340. Q. For what purpose?
Ans. To be returned & relabeled. I am receiving them every day.

341. I believe you say you cannot tell what proportion of those returned have been actual sales?

Ans. No, sir; I take them up everywhere.

480 342. Q. Can you form any estimate?

Ans. No, I could not form any estimate.

343. Q. All that were so returned to change the label, in May, 1872, were sent back to the parties that had them before?

Ans. No; sometimes they would write and say, "I have no money; I will return to you"; & we would send them back pills, & when our travelling agent comes there they would send them back.

344. Q. When you received them did you always send back the same quantity they had before?

Ans. Yes, sir.

345. Q. And is not that true when the parties had purchased & paid for the pills?

Ans. Yes; we endeavored to get up the old labels & put on our new labels, which is very important to us.

346. Q. All the sales, then, of those so returned to be relabeled were broken up?

Ans. Yes, sir; my object was to get them back.

347. Q. Did you ever sell pills for cash?

Ans. Yes, sir.

348. Q. In making out this amount of four hundred and ten

481 gross, as returned, do you mean by that merely they were returned & relabeled, & then sent back to where they were before?

Ans. No; you asked me that before. The man said he had four gross on hand, & in the place we shipped him some to take the place of them, and sometimes we would order them to keep them till the traveler comes back. Sometimes we would tell him to keep them there. I would order two merchants in one place to put them in a box and ship them, to save expense. I would send them the amount there.

349. Q. That was the case where they were purchased or held on commission, treated alike?

Ans. Yes, sir. There was one rule—get back all the pill boxes. My own safety did that.

350. Q. You did that for this purpose; if you were required to account for the labels you got that back?

Ans. We did it to sell our pills.

351. Q. Hadn't you sold them?

Ans. If they could establish another pill for mine, they would.

352. Q. This was done for the purpose of protecting yourself from infringement?

Ans. Yes, sir.

482 353. Q. When did you first think of that?

Ans. In 1851.

354. Q. But you didn't act on it until 1872?

Ans. I acted on it in 1851.

355. Q. You never made any change of labels from 1851 to 1864?

Ans. No; because they were different from others. I will tell you the reason I changed them, if you want to know. I changed my label in 1864 because the merchant wrote me that the red ink faded, & made the pills, even if they were only a short time out, made them look old. I changed the label for that. I then got it in a black label, because black does not fade like red, & I point to the fact of the letter L on the table; it is old; you print that, & in three weeks it will look old.

356. Q. Did it take you fifteen years to find it out?

Ans. It took a long time, but we didn't want to change; but when we can't help it we have to do it. That is the rule in my business. I found it was very injurious for me to continue with that label.

357. Q. You have said this four hundred and ten gross returned
483 here was the average you reached by estimating the amount returned in 1864, when you changed from the red to the black label in 1872 and 1864?

Ans. Yes, sir.

358. Q. Do you mean that was the average quantity returned for the change of label made necessary by the deterioration of the labels?

Ans. No, because I wanted to change it and make it distinct from all others.

359. Q. That average is not arrived at at all by the deterioration of the label, by being out and getting old, &c.?

Ans. Some of these may be so.

360. Q. And that average you got out here, did you take that element into account in reaching that average?

Ans. Yes, of course, I will state those averages came up, and we are conversant with it. We take an average on the 1st January; I take an account of stock as if I had a portion, & we estimate all the pills on hand at eight dollars a gross, and those out to be returned at one-third off. One-third passes back sold or unsold; we are responsible for
484 them, for one-third, and getting an estimate of what our business is every year.

By Mr Dennison:

You charge yourself here with a price of twelve dollars per gross; is that the actual amount for which the pills were sold?

Ans. It is the actual amount they were sold for, as near as I can get at it.

361. Q. How did you get at it?

Ans. By getting the number of grosses & the prices, & putting them all out.

362. Q. Did you take each item of sales, quantities, & price, add it, and find this to be the average amount of sales?

Ans. I ordered them to do so.

363. Q. Do you know whether they did it or not?

Ans. My understanding is, they did; I didn't do it myself; I was watching them at the time; I had other business right here.

364. Q. Did you examine all the items yourself?

Ans. No, I cast myself over it as I do over these (glancing at a piece of paper).

365. Q. You didn't make the computation?

Ans. No, I didn't make the computation myself; I am accustomed to ask my men to do certain work, and I always believe they do just as I tell them.

485 366. Q. You have one item charged here of freight and expenses on pills returned?

Ans. Yes, sir.

367. Q. How is that made up?

Ans. Out of cash charges that is made on the returned pills for the purpose of getting them back and not an item of general expenses; that is a special expense we have to take into account.

368. Q. Is that made up of actual entries on your books?

Ans. I believe so, sir.

369. Q. Do you know?

Ans. I ordered them to do so; I think they did it.

370. Q. Are you able to state any items that make up that sum?

Ans. No, sir.

371. Q. For what purpose were they returned for which this charge is made?

Ans. To put on my new labels and get rid of the old ones.

372. Q. Get rid of what old labels?

Ans. The label marked K.

373. Q. Were they on the pills which you had sold and embraced in the 1,230 gross?

Ans. Yes, sir; and when I changed my label I ordered all the
486 old ones back. I don't like to sell an old one after I commenced making the new one.

374. Q. I understand this item was for expenses incurred in shipping back the pills which had been sold by you with the label K on, and which were returned for the purpose of taking off the label and putting on the label adopted by you on the 21st May, 1872?

(Counsel for defendant objected.)

Ans. It means commission, and all sold put together.

375. Q. It says here sold?

Ans. Sold and removed from my establishment, which was the expense incurred in getting back part of the 1,230 gross that were sold during this time, sold & on commission, and all incurred on the 1,230 gross—when I say sold I mean those gone from me on commission.

376. Q. What proportion of the goods upon which this charge was made was sold, and what proportion commissioned?

Ans. I could not tell you.

377. Q. Will your books show that?

Ans. I think so.

487 378. Q. What was done with the goods returned—the commissioned goods returned—and relabeled?

Ans. Resold and sold again with the new labels on them.

379. Q. On the 21st May, 1872, what amount of pills did you have in the hands of your commission men?

Ans. I could not tell you.

380. Q. Will your books show?

Ans. I think not; it would be a moral impossibility; we took no item of anything of that kind; we didn't suppose anything would be called for. I had no partner. I had no reason to take any such minute accounts. If a man had ten dozen pills and would bring them back we would give him ten dozen for them. We would get rid of the old labels and put our new one out, which was our trade-mark.

381. Q. When did you issue the first lot of goods labelled with the label adopted by you May 21st, 1872?

Ans. Immediately at that time.

382. Q. At what time?

Ans. May 21st, 1872.

383. Q. What quantity did you issue that day?

Ans. As many as a man can print, though we stopped all
488 sales at that time and issued them all before we could refill the sales, just like I done six months ago—stopped the sale of my pills with that label, and issued the new label, and waited two weeks till I got the label.

384. Q. Who got up the new label?

Ans. I did.

385. Q. Did you print it?
Ans. No; my man printed it.
386. Q. Who engraved it?
Ans. A man on Locust street.
387. Q. The label of 21st May, 1872?
Ans. A man that used to work for Aleck McLain engraved that.
388. Q. Who did you employ to do the engraving?
Ans. The man had worked for Aleck McLain; Aleck McLain owed me at that time, & he didn't want it done on his account.
389. Q. It was done by you?
Ans. Yes, sir; I paid the money extra on purpose to hurry it out; he worked at nights, I suppose, to have it done quick.
390. Q. Have you kept an account of labels printed?
Ans. No, sir.
489 391. Q. Can you tell from your books when the pill wrapped in that label passed into your merchandise account?
Ans. The 21st May, 1872.
392. Q. Can you tell from day to day, subsequent to that, at what time any particular lot passed into the merchandise account?
Ans. Yes, sir. I think that every day, and ever since, excepting the change made six months ago, I can tell you.
393. Q. How many of those labels adopted May 21st, 1872, did you use to replace the old labels, K, on goods which had already then been sold by you?
Ans. I could not tell you. It is an impossibility; a moral impossibility.
394. Q. Can you tell how many goods you recalled of those already sold for the purpose of putting the new label on?
Ans. Only from the estimate I gave you; the experience I had before and since. I didn't intend to take an account of it now. Yesterday I received seven gross of them pills with the letter K; a merchant buys two gross of them. I put them on the shelves, and the clerk may pick it up, and it may stay on the shelves six years or two months. I have sent a man to clean them up now for certain.
490 395. Q. Are there any pills with the label K on them now in the hands of your commission men?
Ans. I don't think there is. It is only where there is large lots in that way. I don't commission large lots that way. I don't think there is, & yet there may be.
396. Q. How many of those 410 gross were recalled for the purpose of substituting the new label for the old, and how many were recalled in consequence of the old label having worn out and faded?
Ans. I could not tell you that; it is an impossibility to know.
397. Q. You charged us the expense of manufacturing, material, etc., 1,231 gross, at eight dollars.
Ans. Yes, sir.
398. Q. How do you make up that item of expense?
Ans. That is the item we always entered on goods when we take the entries on the 1st of January. We always estimate the pills at eight dollars a gross. We know they cost more than that. I have taken these two entries to make them agree with the books. The expense of running my store in 1871 was $25,894.13; in 1872, $25,433.46; that
491 is for the year 1871. But you must understand we make the balance-sheet in 1870 made in 1871; then in 1872 made for 1871. You see the point. It would be part of 1871 & 1872. I make it for 1874; we call it 1875; my bills will balance on the first day of January,

1875, and it will be for 1874, made in 1875; but for 1874 we add these both together, and take three-quarters of it; you will get eighteen months, and you will get the expenses if you take the gross; that is, just one item, and you will see there is more than that. The expense of running the store is $39,994.00 for eighteen months; now, you can take the number of pills & see how much they cost. That is just the simple item of running my store.

399. Q. You add it together, and take three-quarters.

Ans. Yes, sir; one-fifth of that, & my pills is one-fifth of my business, $7,998.00. It cost me for simple expenses in the store, for manufacturing 1,230 gross of pills; that is one expense—the simple paying the expense of the hands. There is an expense of five thousand dollars of rent which does not come in there. I own the building, and don't pay the
492 rent, & it is no reason I should not charge the rent for the building: that makes $8,998.00; them pills would cost me—the simple expenses of running the store & building.

400. Q. $8,998.00 is one item of the cost of making 1,231 gross of pills?

Ans. Yes, sir.

401. Q. And that item is the expense of running the store.

Ans. Just the simple expenses of running the store.

402. Q. What other item enters into the cost of the pills?

Ans. The item of the material and the item of the printing & the item wear and tear of machinery, &c.; besides that, I was a little particular, to. I saw what you were making out this morning, and I wanted to be prepared to make an item to show you I had been below the cost of the goods.

403. Q. That would not be the two years you are accounting for?

Ans. I can give you the other years to show you.

404. Q. You add them together, I understand. You are now explaining how you get at the cost of the pills?

Ans. No, because the cost of the pills is what we charge up; we
493 charge them to cost eight dollars a gross, but I can show you they cost more, & had I gone into an item, I would have made the entries that way.

405. Q. You add these sums together and call that the expense of eighteen months?

Ans. Yes, sir; I take one-fifth of that, & it shows the expense chargeable to each medicine, if we individualize the medicine and add a thousand dollars for store rent—I made a mistake; it is a year and a half, and it should be $1,500.00. A man offered to rent the building and pay that for it; $9,498.90 is the net expenses of manufacturing the pills; that is one-fifth of all my store expenses.

By M'r Dennison:

That is the amount chargeable against the pills for store expenses?

Ans. Yes, sir.

406. Q. How much was the cost of material?

Ans. I could not tell you that.

407. Q. To make 1,231 gross.

Ans. I could not tell you. I have never figured it up. I would not unless I am forced to do it. We base our yearly statements, as near as I can come at it, at eight dollars.

408. Q. Have you any means of determining the cost of the composition that would enter into the manufacture of these pills?

494 Ans. No; it goes up and down.

409. Q. Have you any means of ascertaining what was the cost of the material which entered into these particular 1,231 gross?

Ans. Not unless I know exactly what I paid for it.

410. Q. Cannot you tell what you paid for it?

Ans. No; some items I traded; some items I swapped. I deal in black root and swap it off, & make no entry.

411. Q. Cannot you state the value of that material?

Ans. No: I never estimated it. I take this as an underestimate of what the pills cost me.

412. Q. Can you give an approximate estimate of the cost of the material?

Ans. No; I have stated it at eight dollars a gross. It is because I never did it; I always do. If you insist on doing it, I will try to add these expenses & find out. I knew I put the other below what I deemed was the real cost of the pills, and I done so by making these estimates.

413. Q. That estimate of eight dollars was an estimate made for your own purpose?

Ans. What we do all the year round; when we make an estimate of all the pills on hand, it is eight dollars a gross.

495 414. Q. If you thought that eight dollars was below the actual cost of the pills, why didn't you make out what was the cost?

Ans. Because the decree is the estimated cost—it was sent to me to get the estimated cost of the goods, and I had to take my business of twelve years.

415. Q. Do you say the decree requires you to furnish the estimated cost of the goods?

(Defendant's counsel objected.)

Ans. I done it honestly, straightforwardly, what I had already done through my business to find out how much the pills cost me.

416. Q. I want to know whether you had done it under as misapprehenson: I understand you to say this amount stated here of eight dollars is an estimate.

Ans. An estimate of the cost of the pills to me, & an underestimate I know it to be, as I have demonstrated be the figures, unless the master require I shall not go into the specialties.

417. Q. What was the cost of printing as an element in the expense of manufacturing these pills. I am talking now of the expense of manufacturing, the material, &c.

496 418. Q. I am asking you how you make it up, and you say the cost of the material, & the wear and tear, & the rent.

Ans. Printing is another account, it is clerical labor, & such labor as that runs the concern.

419. Q. What else enters into this cost except what you have named?

Ans. The price of pill-boxes and all that class of goods, freight on pill-boxes, freight on material, and handling it, outside of my actual store expenses.

420. Q. What do they amount to?

Ans. I have never gone into an especial estimate; I don't want to expose my business, unless it is necessary.

421. Q. What is the cost of pill-boxes by the gross?

Ans. I could not tell, they have been changed; from my books I can tell pretty near what they cost.

422. Q. Do you include in this item the cost of the labor?

Ans. No, sir.

423. Q. Do you include in it the cost of the printed directions. I am referring to the eight-dollar item: that don't come into that item?

Ans. No, sir.

424. Q. Do you include the cost of the printed direction fo'ded around the boxes?

Ans. No, sir.

497 425. Q. Do you include the cost of the material used and the labor employed in putting on the red seal on the top of the boxes?

Ans. That is calculated in the clerical labor of putting up the concern; this amount I stated is calculated in $25,000.00 a year. We pay for labor; the expense of labor is in the printed account.

426. Q. What I want to get at is the eight-dollar estimate.

Ans. The material, the boxes, & whatever else goes into the manufacturing of the goods, and the other is calculated in the twenty-five thousand dollars that is carried to my establishment; one is charged as expense. It is all merchandise credit & debit. I never have looked at it. I am willing to take things that way, as it is my own.

427. Q. The material, boxes, and labor are all included in the eight dollars per gross?

Ans. Yes, sir.

428. Q. What else?

Ans. Nothing else. The printed wrappers in the other portions of the bill, printing & paper, takes in all the printing the almanacks, circulars, show-bills, &c.

429. Q. Do you make up the cost of material in the same way
498 you arrive at this item of store-expense account?

Ans. No, because we buy some material & put it in my pills & put in my cordial. There is one or two items passes into my cordial that goes into my pills, and it cannot be told unless by weighing the pills & showing how much wear & tear there is in material.

430. Q. How do you find out how much should go into this item as the cost of material?

Ans. I have arrived at it by twenty years' experience.

431. Q. I am talking about one particular part of it.

Ans. I have not estimated it, and don't intend to unless I am forced to.

432. Q. How do you arrive at the amount to be charged into this item for the cost of boxes?

Ans. I have no date for stating that unless I am called on to make that statement.

433. Q. I understand you have not made up the cost of either the materials or the boxes that enter into this eight-dollar item?

Ans. No; I will do it if I am required. I think I can do it. I didn't think you were going into it, seeing it was smaller than the actual expense. I thought you would stop there & not put me to so much trouble.

499 434. Q. Do you not, in making up the amount to be charged into this item, under the head of cost of materials, add up the entire cost of the material used by you in all your medicines, & divide it by five?

Ans. No; because there was some materials go into the other goods, and it would not do at all.

435. Q. Do you charge the cost of your boxes & the cost of bottles, & other charges used in putting up your other medicines, all in the gross, and divide that by five?

Ans. No; I have stated I estimated the cost of the pills to me. I think it was in 1851 we estimated the value of these things in running the concern, & we put these things at what we believe them to be cost

ing, not for this case, & I suppose that was the proper way of doing it; but if you want to do it, and the master says so, I will say so. It will cost more than we sell them for.

436. Q. And you say it will cost more than you sell them for?

Ans. Yes, sir; until we get a big man on them, & we get the profits on them then.

437. Q. What are the ingredients used in making the pills?

500 Ans. I shall not tell. I can give you the cost of the material and the pills, if you want me to do it.

438. Q. Question repeated.

(Counsel for defendant objected. Objection overruled.)

Ans. It would not be proper for me to tell this part of my business, and if I should state that fact it would be known to all the world in ten days, and I don't propose to tell unless I am compelled to. I am willing to go and ascertain the cost of the materials without naming such material.

(Plaintiff insists on a reply from the witness, and the witness refuses, on the ground stated, with the advice of his counsel, & plaintiff asks that this portion of the testimony and proceedings be certified to the clerk's office by the master, in order that an attachment may be applied for to the court against the witness for his contempt in not answering.)

At this point the examination was adjourned until Monday at 2 o' p. m.

JULY 20TH, 1874.

Pursuant to adjournment, the hearing of the case was resumed, as follows:

501 J. H. McLEAN testified as follows:

Judge REBER. The witness is prepared to state and wishes to state the cost of the materials in detail in the pills per gross, but still declines to state of what material they are composed.

(Plaintiff's counsel objected to the proposed statement as being a volunteer statement and not in response to any question put by them, and in giving the prices of articles which he refuses to name, taking away from them the right or ability to prove what the actual price of those articles was, and as seeking to bind them by his valuations, without giving them an opportunity to verify or disprove them.)

The REFEREE. I sustain the objection to any such statement as an examination on the part of the plaintiff, but the defendant is at liberty to amend or supplement his sworn statement heretofore filed before the master, if he choses to.

By M'r Denison:

439. Q. I will now examine you in regard to the item, which reads as follows: One-fifth expenses of printing and paper in advertising; whole expenses, one and a half years, one-fifth, $87,000.00, $17,400.00; what expenses of printing are embraced in this item?

502 Ans. Printing labels; all printing done in the establishment, for advertising pills, printing directions and store-bills, printing labels; all printing done in my establishment.

440. Q. Relating to what?

Ans. Relating to my own entire business, pills included.

441. Q. What do you mean by your entire business?

Ans. I mean the sale of my medicines.

442. Q. What medicines?

Ans. D'r J. H. McLean's Strengthening Cordial, D'r J. H. McLean's

Vulcanic Oil Liniment, D'r J. H. McLean's Candy Vermifuge, D'r J. H. McLean's Universal Pills, D'r J. H. McLean's Churoidine Sugar Pills.

443. Q. Why do you include in this item any reference of printing anything not pertaining to these pills?

Ans. Because I keep my entire printing and paper in one item. I have no separate medicines. I deal in five medicines. That is my business, and exclusive business. I have no other business than that.

444. Q. Why do you charge one fifth of all the expense of doing
503 that work to these pills?

Ans. Because it is one-fifth of the whole. I was at as much expense with that as with any other pills. There are five, and equally *and* expens'e as any other in the printing and paper account.

445. Q. Do you do as much printing in advertising your Universal Pills as you do your Strengthening Cordial?

Ans. Yes, sir; all the same.

446. Q. As much as you do for your Vulcanic Oil Liniment?

Ans. Yes, sir; the same. I have never separated them at all.

447. Q. (By M'r Reber.) In the same advertisement?

Ans. No, sir.

448. Q. (By M'r Denison.) About the same amount?

Ans. About the same, I should guess; I don't keep a separate account: running the five medicines is my exclusive business.

449. Q. How does the amount of printing done to advertise your Universal Pills compare with the amount done to advertise your Strengthening Cordial?

Ans. About the same, and was about the same quantity of space.

450. Q. What do you mean by "about the same"?

504 I think my circulars are about the same; may be about the same on the pills; may be a little more on the pills, as it is the newest business, and I want to run them in the market; the others are in the market.

451. Q. In the matter of labels, how do they compare?

Ans. About the same. They are small, but more of them.

452. Q. You sell more boxes of pills than bottles of cordial?

Ans. No; I have not taken any account of that.

453. Q. I am asking you about the cost.

Ans. The expenses are the same.

454. Q. Did you print as many for your pills as your cordial?

Ans. May be not.

455. Q. Did you print as many for your pills as your liniment?

Ans. I think so; may be not; I don't know. I never took it into account.

456. Q. Do you know whether you did or not?

Ans. No, sir.

457. Q. Why, then, if you don't know, do you charge one-fifth of it to this account?

505 Ans. Because I take the same account, charge the same account in every manner. I charge the ingredient; if I separated them I charge the same.

458. Q. Is this item correct, or an estimate?

Ans. It is a correct item of my printing business.

459. Q. I as' you if it is a correct statement of the amount of printing done in the matter of the pills, or is it an estimate?

Ans It is one-fifth of the whole cost?

460. Q. I have not asked you that. I ask you again whether you have stated in this item the amount of $17,420.00 as the expense of

printing in advertising the Universal Pills correctly from figures, or is it an estimate?

Ans. It is no estimate; it is one-fifth of the amount of the others, and I believe a correct estimate and a correct amount.

(Question repeated.)

Ans. It is one-fifth of the amount of the whole, and I believe it cost me that much for that individual medicine. I believe that is the answer, as near as I can get it; you see where I am drifting to.

461. Q. Do you swear that the printing-paper actually used in advertising your Universal Pills during the year and a half from the
506 9th of November, 1870, to May 21st, 1872, cost $17,400.00?

Ans. Yes, sir.

462. Q. What amount of that was used in printing the label used on your Universal Pills?

Ans. I could not tell you.

463. Q. Could you tell from your books?

Ans. It is impossible.

464. Q. What amount was used in printed directions which went around each box of your bills?

Ans. I could not tell you.

465. Q. Will your books tell you?

Ans. No, sir.

466. Q. What amount of it was used in printing the notices of your pills in the almanacs which you say you published?

Ans. I could not tell you.

467. Q. What amount of it did it cost you to advertise these pills in the circulars which you sent out that year?

Ans. I could not tell the exact amount. We charge everything to advertising.

468. Q. What else goes into the item of printing and advertising?

Ans. Everything in the matter of advertising and running the business.

507 469. Q. What else?

Ans. I could not tell you, for that includes all.

470. Q. The label, printing directions? Printing directions, almanacs, and other advertising matter?

471. Q. The other advertising matter?

Ans. I am printing a newspaper called the Spirit of the Age.

472. Q. How was it in 1870?

Ans. I don't recollect exactly. I think it was 1870; I could tell you.

473. Q. You don't know whether if formed any part of this cost or not?

Ans. Not now.

474. Q. Could you tell, from your books, what, if any, part of this amount was expended in paper or advertising these pills?

Ans. No; because I never divided it. I give each medicine the same space.

475. Q. Do you know the cost of the paper?

Ans. No, sir.

476. Q. Could you tell from your books?

Ans. No, sir.

477. Q. Are you able to tell the cost of the almanacs from your books, or in any other manner?

Ans. I could, by looking at my books, see what it was for
508 printing, and what it cost for paper, and what the freight was.

I don't believe I could, because I use other paper of the same size for circulars and other things.

478. Q. Can you tell what portion of this amount of $17,400.00 you have expended for advertising your pills in circulars?

Ans. No, sir.

479. Q. Can you tell the gross cost of circulars?

Ans. I can tell the gross cost of printing, not the gross cost of circulars.

480. Q. Can you tell the gross cost of all the printed directions which are wrapped around each package?

Ans. Not separately.

481. Q. What do you mean by separately?

Ans. I could not separate and say how much they cost from the other advertising. It is all changed in the printing and paper account.

482. Q. Can't you tell how much they cost by the hundred or thousand?

Ans. No, sir.

483. Do you print them?

Ans. No.

484. Q. I thought you said it was done in your establishment.

Ans. No.

509 485. Q. Have not you got the bills which will show the cost of it?

Ans. I have the bills, which show the cost of the paper at one place and the printing at another, and I have it cut at another.

486. Q. Can't you show the gross cost in different ways from the books?

Ans. I can show the gross cost, the printing account of the paper in my store. It is a moral impossibility to state what it would cost one single item. I keep in partner.

487. Q. You have no way of separating the cost of these pills from the cost of your other medicines?

Ans. Yes, sir; I know I have the actual cost of the pills here.

488. Q. I am talking about the advertising.

Ans. No; I can't tell. You asked me a general question.

489. Q. Does this embrace all you have paid for printing done outside of your establishment, as well as that done by yourself?

Ans. Yes, sir; they have all gone into the printing and paper account.

490. Q. In what book do you keep that account?

510 Ans. In the regular ledger; it passes through the journal, not as an item, but as a whole.

491. Q. How is the whole made up?

Ans. Of a ledger account.

492. Q. Itemized?

Ans. No, sir; not itemized. If you send me a bill for printing so many bundles of paper directions, that goes in the printing and paper account. It is charged and credited to the paper account by double entry.

493. Q. Doesn't that appear on your books?

Ans. No, sir; so many bundles of directions; we don't print them by the distinct piece. It says directions. It don't say whether pill directions or vermifuge directions. That paper is sometimes taken out of my paper. Sometimes I send out and buy some, and sometimes they buy the paper, if it is advisable, and they charge it in the printing account.

494. Q. Who do you mean by they?

Ans. Wiebrisch; he does my printing.

495. Q. Will your books show how many quires of paper you have purchased?

Ans. No; only in large lots; not in that; it is mixed up.

496. Q. With what other amounts?

511 Ans. I gave an order to Wiebusch for the paper, to go and print certain things. He charges ink, the paper, and printing.

497. Q. The books will show what you have bought there, you and Wiebusch?

Ans. No; we will have to turn to the bills.

498. Q. How do you get the printing done by M'r Wiebusch?

Ans. By contract.

499. Q. Do the terms of the contract appear on your books?

Ans. No; the contract price does.

500. Q. The price actually paid by you to him?

Ans. Yes, sir.

501. Q. How many labels did you print, or have printed, at this time for your Universal Pill?

Ans. I believe the mention is there 1,230 gross.

502. Q. Then that is the proper number of labels to be charged against the Universal Pill?

Ans. Except those we spoil.

503. Q. How many do you spoil?

Ans. It is impossible to tell.

504. Q. Do you know whether you spoil any?

512 Ans. Sometimes they spoil two or three reams.

505. Q. How many reams did you have printed for your cordial?

Ans. It is impossible to tell.

506. Q. How many for your liniment?

Ans. It is impossible to tell.

507. Q. How many for your Chinoidine Sugar Pill?

Ans. I could not tell; it is impossible to tell.

508. Q. How many printed directions did you have to go around your pill-boxes?

Ans. I could not tell.

509. Q. Will your books show any of these items?

Ans. Not separately.

510. Q. Is there any way of arriving at it from your books?

Ans. No. It was my intention to have got these items. I have no partner. I keep my books in bulk.

511. Q. How many printed directions were printed to wrap around your Strengthening Cordial?

Ans. I could not tell you.

512. Q. How many for the liniment?

Ans. I could not tell you.

513. Q. How many for the vermifuge.

513 Ans. I could not tell you.

514. Q. How do you know that one-fifth of the cost is chargeable to the Universal Pill?

Ans. Because I believe one-fifth is chargeable to the pills.

515. Q. That is your belief?

Ans. Yes, sir.

516. Q. But you are not able to state that the cost of the printed matter used around your Universal Pills is one-fifth of your printing and paper account?

Ans. All included, it is one-fifth.

517. Q. How do you know?

Ans. I believe so from my business.

518. Q. Is it an estimate or do your books show it?

Ans. No; I believe my Universal Pills cost more than the other; I have paid more attention to it because it was the smaller of the brood.

519. Q. What do you mean by the smaller of the brood?

Ans. A twenty-five-cent article.

520. Q. This $14,772.00, the first item, is the gross amount of your sales during that item?

Ans. Yes, sir.

521. Q. What was the gross amount of you sales of the Strengthening Cordial during that time?

514 * Ans. I could not tell you.

522. Q. Will your books show that?

Ans. No, sir.

523. Q. What was the gross amount of the sales of your liniment?

Ans. I could not tell you.

524. Q. Will your books show?

Ans. No, sir.

525. Q. Will your books show, or are you able to state, the gross amount of the sales of either of your medicines?

Ans. I don't think so.

526. Q. How can you fix this amount on the pills and not the other?

Ans. We have a certain date to another date.

527. Q. Have not you the same date to other medicines?

Ans. We could find the same date, of course; we could find the certain number of liniment there if we hunted it up.

528. Q. Was the gross amount of the cordial sold greater than the pills?

Ans. Greater.

530. Q. How much greater?

Ans. I could not tell you.

531. Q. How much did you sell in 1871 of it?

Ans. I could not tell you.

532. Q. How much did you in 1872?

515 Ans. I could not tell you. We are talking about expenses. I stated the fact one-fifth; that the pills cost me one-fifth of the expenses that the others did.

533. Q. Did not you advertise in 1872 that you had sold two million bottles of your cordial in 1871?

Ans. I don't know.

534. Q. Did not you advertise in 1871 that you had sold two million bottles in 1870?

Ans. I don't know.

Judge REBER. We make an objection that the quantity of these respective medicines sold by the defendant is immaterial. We object to the course of the inquiry on account of its immateriality. The inquiry is not what was the profit made on the respective medicine, or whether more of one kind of medicine was sold than another medicine; but the question is, what was the cost of advertising the particular medicine in question; whether there was a profit made on that medicine, is the inquiry, and not whether there was a profit made on other medicines.

(The master overruled the objection.)

335. Q. What printed matter accompanied each bottle of cordial?

Ans. A wrapper and direction.

536. Q. Your liniment?

516 Ans. Wrapper and directions.

537. Q. Your Chinoidine Sugar Pills?

Ans. Wrapper and directions.

538. Q. And the vermifuge?

Ans. Wrapper and directions.

539. Q. What was the contents of the directions—were all the same or different?

Ans. I think they are about the same. I may have undertaken to have put on a separate slip around the pill; it was nobody's business but my own.

540. Q. (By Mr. Gray.) You may have put in a gold dollar; but that is not the question. Did you or did you not?

Ans. I say I don't know whether I was foolish then or not.

541. Q. What difference, if any, was there about the directions wrapped around the packages of each of the medicines as to the quantity of matter?

Ans. I don't know that there was any difference.

542. Q. Did not you ordinarily put the same directions around such package?

Ans. No. I put the same sized direction around each package.

543. Q. What are you speaking of?

Ans. The directions.

517 544. Q. Answering to the printed direction around the pills, you mean by the wrapper what you call label?

Ans. Yes, sir; and that is the printed direction.

545. Q. You say this is a specimen of the direction which you put around the pills? (Handing paper to witness marked "Exhibit 1.")

Ans. Yes, sir.

546. Q. How do the printed directions wrapped around your other medicines compare with this in size?

Ans. The quantity of printed matter about the same.

547. Q. Do they cost the same?

Ans. No. The direction is about the same. Sometimes we use a rougher article of paper around the cordial, and other times about the same. It is easy to wrap and don't hurt so much; but the pills are small, and so we have to take a better class of paper for the pills.

548. Q. And how about the cost?

Ans. Sometimes there is a change; sometimes we make this and the vermifuge of better paper than we do the other medicines.

518 549. Q. How was it during the time mentioned in this item?

Ans. That is my general rule.

550. Q. You don't know what difference there was then?

Ans. I was not aware I was going to be called on to state these facts, and I kept no accounts.

551. How much would the difference that you have spoken of on account of the paper amount to?

Ans. I could not tell you. My orders in buying paper for small medicines, when the wrapping had something to do with it, is to buy better paper than for the other. If it was not complied with I could always tell. Sometimes I see it and other times I do not.

552. Q. What is the comparative cost of printing the label used on your Universal Pill with that used on your Strengthening Cordial?

Ans. A good deal of difference; the paper cost more for pills; we pay a large price.

553. Q. How much more?

Ans. I could not tell you.

554. Q. How do you know it costs more?

Ans. Because I buy a different class of paper: much finer is used for this.

519 555. Q. The same size?

Ans. Much smaller and heavier.

556. Q. Which is the smaller?

Ans. The pills much smaller and much better-sized.

557. Q. How about the cost and labor of printing?

Ans. It costs more because is not so much on a stone.

558. Q. Costs more for each label?

Ans. No; more for each draw. There is six of the cordial on the stone.

559. Q. Which costs the most, one label for the pill-box or one label for the bottle of cordial?

Ans. I think the label for the bottle of cordial costs the most.

560. Q. Which costs the most, one label for your Universal Pills or one label for the Vulcanic Oil Liniment?

Ans. About the same. I think the pills cost more than the liniment; it is not so costly.

561. Q. Which costs the most, the label for your Universal Pill box or your vermifuge?

Ans. About the same.

562. Q. About the Chinoidine Pill wrapper?

Ans. About the same.

520 563. Q. How many wrappers do you use for your cordial as compared with the number used for your Universal Pill?

Ans. I could not tell you; it would be impossible.

564. Q. Can't you tell how many you used during the time included in this item of your account?

Ans. No, sir.

565. Q. Why can't you tell the number of packages of cordial from your books as well as you can tell the number of packages of the Universal Pill from your books?

Ans. I may be able. I don't know whether I would or not.

566. Q. Don't you keep the accounts the same way?

Ans. Yes, sir; and you are asking me a question I have not examined at all.

567. Q. Then your books ought to show that fact as well as it shows the number of packages of pills?

Ans. Yes, sir.

568. Q. Will your books also show the number of packages of your liniment sold?

Ans. Yes, sir; I think so.

569. Q. Also of your Chinoidine Pill and your vermifuge?

Ans. Yes, sir.

521 570. Q. Would your books show the number of almanacs that you printed during the time mentioned in this item?

Ans. I am afraid not.

571. Q. Why not?

Ans. Because it would be in some printing. For instance, Wiebusch would send me up 300 almanacs, ten pounds of paper, two bottles of ink for my press, 3,000 circulars, 3,000 posters, 3 reams directions. That is entered in my journal in bulk.

572. Q. Have not you got the bills he rendered you?

Ans. Yes, sir. I believe if I went back to the bills it would show it.

573. Q. How many almanacs did you print for 1870?

Ans. I could not recollect.

574. Q. How many for the year 1871?

Ans. I could not recollect. I don't know.

575. Q. Would your books show?

Ans. No. The others would. I don't think they would, unless I took the way you spoke of, and then I don't know whether it would be a proper account.

576. Q. What do you mean by a proper account?

522 Ans. Whether we get an accurate statement of the amount of almanacs.

577. Q. How many did you order him to print?

Ans. I could not tell you.

578. Q. How did you contract with him for their printing?

Ans. For so much a thousand for printing and so much for binding.

579. Q. Did you make any special contract for these almanacs?

Ans. Yes, sir.

580. Q. For the number?

Ans. No. He was to take my season's printing at so much a thousand.

581. Q. What was that contract price?

Ans. I could not tell you. I never kept anything in my head.

582. Q. Your books show that?

Ans. Yes.

583. Q. Who printed your circulars?

Ans. I believe Wiebusch printed them all in that year.

584. Q. What year?

Ans. 1870, 1871, and 1872. I was in the habit of printing outside sometimes, but I think in those Wiebusch printed them.

585. Q. How much did he charge you a thousand for them?

523 Ans. For which?

586. Q. Your circulars.

Ans. I could not tell you.

587. Q. Would your books show that?

Ans. Not unless we went into special bills.

588. Q. What do you mean by special bills?

Ans. The bill M'r Wiebusch rendered me for a certain amount.

589. Q. Your books would show the gross amount paid Wiebusch?

Ans. Yes, sir. I don't think it would the detailed amount. I have an arrangement with Wiebusch what we call receipts, and at the expiration of every month he brings me up a statement of what he has done, and the items were checked off by the receipts, and the receipts destroyed at the end of the month. I send you up five barrels of flour and three barrels of flour, and when the bill is paid it is a settlement of the account of so many barrels of flour this day and this day, and the receipts are destroyed; the dray-tickets are destroyed at the end of every month, whenever it is checked off by M'r Taylor. I give him a check on Taylor, O. K. That is the reason I don't believe the thing could be gone over to specialize. I do the same way with my

524 boxes, and the amount is there for dray-tickets, not for boxes. We don't want to keep a record of that.

590. Q. Don't you file away the monthly statements sent to you?

Ans. Yes.

591. Q. Don't you file away the dray-tickets or itemized bills?

Ans. If itemized, they will be filed; and receipts therefor, if receipted for, they will be filed.

592. Q. Where did you get this $87,000 00?

Ans. From my printing and paper account; my balance sheet at the end of the year.

593. Q. That is all that during this year and a half had been charged into these accounts?

Ans. Yes, sir; every dollar, and it is correct as we can make it.

594. Q. And you are not able without a further examination of your books to tell what proportion of that was expended in advertising the Universal Pills?

Ans. I could not with an examination of the books. It would be an impossibility. I know what I say.

595. Q. Could not you tell the number of packages of each kind of medicine which you sent out.

525 Ans. Yes, sir.

596. Q. Just exactly as you have of the pills?

Ans. Yes, sir; but I could not tell the number of posters and circulars and the number of papers used for the articles.

597. Q. What do you do with the circulars?

Ans. Send them all over the country.

598. Q. How?

Ans. In various ways; sometimes by mail, sometimes by express, sometimes by our agents.

599. Q. Don't you send them in the larger packages of your medicine?

Ans. Yes, sir; and sometimes show-bills in one package. For instance, I sent away 50,000 posters, and I did not send a dollar's worth of anything else. I have printed in this month above 200,000 posters. I run one article a while and stop and go over another article.

600. Q. Have you specimens of the different articles that you published during this time?

Ans. No, sir; it could not be done.

601. Q. Have you specimens of your almanacs you published during those two years?

Ans. Yes, sir; I think I have them in a book, bound.

526 60'. Q. Can you tell what proportion of the advertising done in those almanacs was on account of the Universal Pills?

Ans. About one-fifth.

603. Q. How do you arrive at that?

Ans. I supply as much space to one as the other. I am not giving them as much space, but I speak of them as often as I do of the others.

604. Q. How much is the space used?

Ans. I give one place as prominent as the other.

605. Q. Why do you say one-fifth is for the pills?

Ans. Because it occupies one-fifth of the whole almanac.

606. Q. You state that, do you?

Ans. Yes.

607. Q. Is that true of your almanacs for 1871?

Ans. Yes, sir.

608. Q. Or 1872?

Ans. Yes, sir.

609. Q. Or 1870?

Ans. Yes, sir; although every year sometimes it may run a little less, but we make it up; in the receipts we give it more. I don't testify any one five times more or less, but the prominence given to all is alike.

610. Q. What do you mean by receipts?

Ans. I give receipts in my almanacs why you should take pills.

527 If you had a colic I would give you pills. It is called receipts in the almanac, directions to use. I had to make recipes.

611. Q. That is part of the printed matter?

Ans. Yes, sir; part of the printing in the almanac.

612. Q. It is not a separate paper?

Ans. No; it is part of the matter printed in. They are all my own, and I read them fairly.

613. Q. What other items are there of these expenses of printing, paper, advertising, besides these you have spoken of?

Ans. I am publishing a Floral—a receipt book—Foral Handbook some call it.

614. Q. When did you begin to publish that one?

Ans. I think I commenced in 1869. That is my recollection.

615. Q. How long did you continue to publish it?

Ans. Up to to-day.

616. Q. How many did you issue during the year and a half mentioned in the account?

Ans. I could not tell you.

617. Q. Did you issue any?

Ans. Yes, sir.

618. Q. What proportion of the space in that book was devoted to the Universal Pill?

528 Ans. One-fifth and a little more to the pills than the others. That is my recollection about it.

619. Q. What other items of expense of printing is included in this?

Ans. I don't recollect any other items.

620. Q. Does your board-fence printing come in there?

Ans. No; that comes in general expenses.

621. Q. (By Mr. Gray.) Where do the everlasting rocks come in?

Ans. That is where you and I will go one of these days.

622. Q. (By Mr. Denison.) As I understand, that is included in the current expenses, rocks and fence printing?

Ans. It is my recollection. I don't keep the books, of course. I know all the books, but I don't go to itemizing. Sometimes my bookkeeper knows when my bills go in. If I pay a bill he knows where it goes, whether paper or printing account, or expense account; he knows about that.

623. Q. There are no other items of expense charged in this bill?

Ans. That I recollect of.

624. Q. I understood you to say all your labels had been printed by Wiebusch?

529 Ans. No; none printed; all were printed in my establishment.

625. Q. All of them?

Ans. No; my vermifuge was printed by Wiebusch.

626. Q. I am asking from the 9th of November to May 21st.

Ans. Yes, sir.

627. Q. All except the vermifuge were printed in your establishment?

Ans. Yes, sir.

628. Q. And the lithographing, was that done in your place too?

Ans. Yes, sir.

629. Q. You have done all the lithographing at your place since 9th November, 1870?

Ans. Yes; and previous to that, I think, two years before. If I recollect right, it was about 1865 or 1866 I commenced printing my own

label. I heard of it being taken to other places and stopped that, so as to have no trade-marks out of my own house.

630. Q. The labor of making the lithographic stone, is that charged here in this item?

Ans. No; it is not included at—it is not included in the expenses yet.

631. Q. Is it in this other item?

Ans. No; That is yet to come in as an additional expense we overlooked when we put in the bills. It is included in the yearly
530 expenses of labor put in the goods.

632. Q. The printing the labels is changed in this last item?

Ans. No; it is not. It is in my own store expenses.

633. Q. What part of the getting up of the label is charged here?

Ans. The paper.

634. Q. Nothing else?

Ans. No. I understood M'r Taylor to say he charges all the labor expense to one expense, store expense. It is not in this bill.

635. Q. It is included in your statement, the store expenses?

Ans. No; it is not down there yet. There is $19,000.00 to go there yet as the expense of my store.

636. Q. You testified the other day to the expense of the store?

Ans. No; I made a mistake; that the cost of the pills was taken by my regular yearly account. I balance my account, and if there is any pills on hand I charge $8.00 a gross. I state the pills cost more than that.

637. Q. But your almanacs are changed into this last item entirely?

Ans. Yes, sir; the printing expense item. They are not printed by me, but outside.

531 638. Q. But the circulars are charged into this item?

Ans. Yes, sir; all, and more, too, because here is, for instance, a small circular that we got up for certain distribution. We use the printing that would belong to the printing account, and the boys' account would go into the printing account, and the paper would go in the other account, that comes in clerical labor belonging to my establishment.

639. Q. Is all the cost of the Floral Handbook charged into this item?

Ans. Yes, sir; but not all the cost of the almanacs. I will correct that matter again, because we print a man's name; for instance, I put your card on the back of the almanac. I could do that in the store, and the almanac would go into Wiebusch's, and the printing of the card would be store expenses, but the almanac proper would be charged in that account. I thought the store expenses formed a part of the third item, a part of the cost of the pills, but it is separate and distinct, and an additional cost to me.

640. Q. Do you mean to say your store expenses are not there?

Ans. They will be in addition to this statement.

532 641. Q. You state the expenses of running your store in 1871 were $25,894.13, and in 1872, $25,433.06?

Ans. That is correct. I have got now a detailed statement of actual store expenses, and will bring that in in the proper place.

642. Q. And you stated that in answer to my question as to how you made up the item of expense, charged as expense, manufacturing material, &c. Are you able to tell how much the labor counted in your store expenses was bestowed on these pills, and how much on the other medicine?

Ans. There is no labor bestowed on the pills in this account; the labor has to be added. The labor of store expenses has to be added to the cost of the pills.

643. Q. Do you say that your store expenses form no element in the manufacture, as charged in your account filed here?

Ans. No; not an item.

644. Q. How is this item: expense, manufacture, material, &c., 1231 gross, 8.00; total, $9,848.00, made up?

Ans. The cost of the pills, coating the pill-boxes, the paper boxes, the box for packing by the gross, sawdust, packing and internal-
533 revenue stamps. I have it here exactly, costing me $8,999.00 per gross, by an actual examination.

645. Q. Give the cost of each item you have mentioned by the gross.

Ans. Actual cost per gross, $2.25 for material; actual cost of material for coating and coating, $2.25 per gross; boxes, 40 cents per gross; paper boxes, $2.50 per gross; box for packing by the gross, 12 cents; sawdust, 3 cents; United States stamps, $1.44 per gross. I will explain here I have made my statement so as to agree with the usual routine of my business.

646. How many paper boxes does it take to pack a gross of pills?

Ans. Twelve boxes. There is a mistake. It is one-twelfth of $2.50. I should say there is a mistake. I have a bill and it calls for $2.50 a gross.

647. Q. How do you modify it, then?

Ans. It is per gross I took the bill, and I saw it was $2.50 I have been paying for the gross.

648. Q. How do you make up the balance of $8.00 per gross, as charged here?

Ans. I have not made up the balance. I will have to review that. There will be $1.30 per gross that I have not got, but there is a
534 mistake occurred in this matter.

649. Q. Is this item correct?

Ans. It is estimated, as I state to you.

650. Q. Is the item as it stands here correct?

Ans. It is correct according to my books, but not according to the actual cost.

651. Q. Is it correct or not?

Ans. The cost is more than that; that I shall have to add the cost of preparing the pills in addition to the $6.70, which I intended to have added here in the estimated bill.

652. Q. You abandon the account?

Ans. No; I don't abandon the account. Here is an item I did not know was in the account. I did not expect to have to go into details. I knew I lost a large amount on the pills that year.

653. Q. How do you make up the balance of the $8.00 per gross, as charged in this item, above the $6.70 per gross which you have already given.

Ans. I shall have to enter here the amount of expense for manufacturing and clerical force in my store in addition to the cost.

654. Q. Does this item—expense manufacture on 1,231 gross, $8.00; total, 9,848.00—state correctly the expense of manufacturing the
535 Universal Pills per gross and the cost of material they contain? Do you understand the question?

Ans. Yes, sir; it is not the last. The item $8.00 is not sufficient. It cost me more. In the account filed here $8.00 per gross is not sufficient, I find on examination. I find that item was made up as an experience of twenty years, and that is what I have been putting my goods at when I took account of stock every year. I find that on examination the goods cost me more.

655. Q. What other expense of manufacture or material should be added to make up the $8.00 you have charged in your account?

Ans. The expense of the store, clerical force, the clerical labor, and the men to make them, and the wear and tear of the building, the rent of my building, and other expenses connected with my business.

656. Q. Specify that?

Ans. I could not do it.

657. Q. State the amount of the cost of each of the items you have named.

Ans. I could not do it.

658. Q. Can you state the amount to be charged in this item on account of any one of these things you have mentioned?

Ans. It is all charged into the expense account.

536 (Question repeated.)

Ans. Not any item, not any separate item.

659. Q. Expense account of what?

Ans. Manufacturing my medicines.

660. Q. What amount is charged to the Universal Pills?

Ans. One-fifth of each.

661. Q. How much does that amount to per gross of the pills?

Ans. I can't tell. I have not it itemized here. I will have the account corrected and placed in shape and will tell you.

662. Q When can you have it corrected and placed in shape?

Ans. I can do it now. My expenses for the store from the 9th of November, 1870, to December 31st, 1870, $719.30. That is actually one-fifth of the expense of the whole.

663. Q. That is one-fifth?

Ans. Yes, sir.

664. Q. I mean that is one-fifth of what it cost you?

Ans. Yes; movable stock, that is a different account, $58.33. That is connected with the same expenses. From January 1st, '71, to December 31st, 1871, the expenses would $5,086.61, one-fifth of

537 the whole expenses. My whole expenses would be five times that. The movable account, running wagons, breaking wagons, &c.—general expenses—we can't put in the expense account, $500.00, even. From January 1st, 1872, to May 21st, 1872, expenses $1,967.15, one-fifth movables. $233.33. That has to be added to the cost of the pills, or make two items of it. That will tell you the cost of the pills in connection with the printing and paper account.

665. Q. There are there separate items of expenses?

Ans. The rent is to be added.

666. Q. Then that is not correct?

Ans. No; I did not think you were going into these items.

667. Q. Then is the rent and the store expenses?

Ans. Yes, sir.

668. Q. And what else?

Ans. And movable stock.

669. Q. That means the spotted mules?

Ans. Yes, sir.

670. Q. What is included in this amount of rent?

Ans. The rent of the store.

671. What store?

Ans. My store 3141 Chestnut street.

538 672. Q. (By M'r Stratton.) You did not state how much it was?

Ans. $5,000.00; I was offered $5,000 a year for the place twice.

673. Q. When was that?
Ans. About a year ago.
(Plaintiff's counsel asked that the last testimony of the witness be ruled out.)
674. Q. (By Mr Gray.) You own the place?
Ans. Yes.
675. Q. When did you go into it?
Ans. 1865 or 1866.
676. Q. Were you there carrying on business on the 9th of November, 1870?
Ans. 1870.
677. Q. What were you doing?
Ans. Manufacturing.
678. Q. Putting up patent medicines?
Ans. Yes, sir; exclusively.
679. Q. Did you make any addition to the premises?
Ans. No, sir.
680. Q. Or did the renting value of the premises increase any from that time?
Ans. No; it has diminished the last year or two.
681. Q. How about November, 1870 and May, 1872.
Ans. That is what it was worth, continued the same as before.
539 682. Q. Did you, from the 9th of November, 1870, for a year and a half after that time, employ any more men or occupy any more room in the store by reason of the sale & manufacture of these pills?
Ans. No, sir; just the same. I occupied the same store I had then and have now. I rented part of it to somebody I did not have before.
683. Q. Did you use it all?
Ans. Yes, sir, every foot of it. It was about a year and a half ago. I have always manufactured pills since 1852, more or less. It was part of my business, more now than I did before, but previous to that time I did not.
684. Q. What proportion of your store is occupied for the purpose of manufacturing or selling your pills?
Ans. One-fifth of it, maybe a little more. It takes more room to run pills than anything else.
685. Q. During that time how was it?
Ans. Just the same since that time. I require more. I require more room and more machinery since that time.
686. Q. What proportion of the room occupied by you was
540 devoted exclusively to the manufacture of pills between November 9th, 1870, and May 21st, 1872?
Ans. There was none occupied exclusively. It was all mixed together, all on one floor.
687. Q. What proportion was occupied in the manufacture of the pills?
Ans. About the same as the others, all mixed up.
688. Q. How mixed up?
Ans. A portion in the third story. We did exclusively put one thing to any one use. I have one floor for the finishing.
689. Q. Did you pack them on the same table?
Ans. No; on the cordial table.
690. Q. Did you make any exclusive place for any of your medicines?
Ans. No; we don't manufacture the liniment up-stairs because it is greasy.
691. Q. Where do you mix the mass of which the pills are manufactured?

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681. Q. How about November, 1870 and May, 1872.

Ans. That is what it was worth, continued the same as before.

539 682. Q. Did you, from the 9th of November, 1870, for a year and a half after that time, employ any more men or occupy any more room in the store by reason of the sale & manufacture of these pills?

Ans. No, sir; just the same. I occupied the same store I had then and have now. I rented part of it to somebody I did not have before.

683. Q. Did you use it all?

Ans. Yes, sir, every foot of it. It was about a year and a half ago. I have always manufactured pills since 1852, more or less. It was part of my business, more now than I did before, but previous to that time I did not.

684. Q. What proportion of your store is occupied for the purpose of manufacturing or selling your pills?

Ans. One-fifth of it, maybe a little more. It takes more room to run pills than anything else.

685. Q. During that time how was it?

Ans. Just the same since that time. I require more. I require more room and more machinery since that time.

540 686. Q. What proportion of the room occupied by you was devoted exclusively to the manufacture of pills between November 9th, 1870, and May 21st, 1872?

Ans. There was none occupied exclusively. It was all mixed together, all on one floor.

687. Q. What proportion was occupied in the manufacture of the pills?

Ans. About the same as the others, all mixed up.

688. Q. How mixed up?

Ans. A portion in the third story. We did exclusively put one thing to any one use. I have one floor for the finishing.

689. Q. Did you pack them on the same table?

Ans. No; on the cordial table.

690. Q. Did you make any exclusive place for any of your medicines?

Ans. No; we don't manufacture the liniment up-stairs because it is greasy.

691. Q. Where do you mix the mass of which the pills are manufactured?

Ans. Sometimes on the third or fourth or fifth floor, where we have the heat.

692. Q. How much space does that take?

Ans. About one-fifth of the store.

693. Q. Where do you manufacture your pills out of the mass?

Ans. Upon the fifth floor.

694. Q. How much space does that take?

Ans. About one-fifth of the whole.

541 695. Q. Where did you put your pills in your box?

Ans. On the fifth floor generally, sometimes below; it depends on the room we have and the heat we have.

696. Q. How many did you employ in putting the pills up and wrapping them with labels?

Ans. I could not tell you—sometimes we change the girls from the pills to the vermifuge and to the liniment.

697. Q. Did not you have at that time anybody specially employed in wrapping the pills?

Ans. No; I did not have them at that time; I have them now.

698. Q. How much space was occupied in that part of the business?

Ans. One-fifth of the whole. I use one fifth of the whole for the pills. I did not measure it.

699. Q. After you wrap them where do you put them up in the packages?

Ans. Sometimes I bring them down and sometimes up stairs.

700. Q. What proportion is occupied by that part of the medicine?

542 Ans. One-fifth of the whole for all things. It is foolish to ask the question.

701. Q. You mean to close it all up by saying it is one-fifth in everything except the profits?

Ans. Yes, sir; I devote as much time to my pills as to the other things—as much time to my advertising one as the other. In any general way of running my business I devote as much time to one as the other.

702. Q. Don't you get one fifth profit on the pills as well as the rest?

Ans. Yes, sir; if they sell enough to yield profit. It is no reason because there is a profit on one there is on another.

703. Q. Don't this one-fifth run through the whole thing?

Ans. No; some others will sell more with the same amount of advertising & publishing—will sell ten times as much as I did of that; I am selling of some seventy times as much as I did that year; I think about seventy times as much as I was in those years.

704. Q. (By M'r Stratton.) With no greater expense of advertising?

Ans. No, sir.

705. Q. (By M'r Gray.) I believe you say seventy times as much?

543 Ans. Yes, sir; my clerk made a running report.

706. Q (By M'r Denison.) Now, with regard to the question of labor employed in putting these up, you say the labor is an element of your store expenses?

Ans. Yes, sir.

707. Q. The cost of the labor of putting up the pills is equal to the other medicine?

Ans. Sometimes it is and sometimes it is not. I never put down a special charge.

708. Q. If you sell seventy times as much of one as of the other, how does it happen the labor is the same?

Ans. It costs just as much to put up the pills as a dollar medicine—as the cordial. The price is greater.

709. Q. You sell the pills at a dollar & half a dozen?

Ans. $12.00 a gross.

710. Q. You advertise to sell at a dollar and a half?

Ans. No, I do not; I put my price-current at a dollar and a half a dozen: we may vary from them.

711. Q. What do you put your cordial at in that?

544 Ans. $8.50 a dozen about. I don't cost any more labor to put 12 cordial than ⅔ of the pills. We never estimate any special amount of that kind.

712. Q. How many pills can a girl put up in a day?

Ans. I could not tell you.

713. Q. How many girls do you employ?

Ans. Now and then?

714 Q. Both.

Ans. I think I employ two or three now.

715. Q. Did you employ more than one then?

Ans. I could not tell without looking at my book. I could not tell whether I have their book. I don't believe I could find the books.

716. Q. Your clerk here, your salesman, your bookkeeper, what proportion of their cost do you charge to the pills?

Ans. One-fifth.

717. Q. Why one fifth?

Ans. Because they require that amount of labor.

718. Q. How do you know that?

Ans. Because they require really more labor.

719. Q. How do you know it?

545 Ans. They were a smaller amount of goods, and they require more labor and more attention. We sell more pills and more cordial than we do of the other.

720. Q. How about the number of packages?

Ans. More packages of the pills than of the others.

721. Q. You sold 1.231 gross of pills; do you mean to say you have not sold a greater number of packages of cordial during that time?

Ans. I don't know.

722. Q How do you know there has been the same amount of work performed about the pills, by all the employees you mention, than about the other medicines?

Ans. I know; because it is the same attention to one dozen as to ten dozen. It is as hard to put down one dozen as ten dozen.

723. Q. That is supposing there was the same number of sales of one as the other?

Ans. I can't tell. I am telling you to take the one-fifth to attend to it.

724. Q. Is not that mere guess work?

Ans. No; I know from my own business.

725. Q. How do you know it?

Ans. I know it from seeing the business.

726. Q. Do you know it by standing around and seeing the entries?

Ans. I know the entries are made.

727. Q. Have you compared them?

546 Ans. No, because I have done it myself and know it. It took me some time to enter all the pills. I used to do this thing before I hired clerks.

728. Q. Have not you lumped these things and divided it by five?

Ans. No; I have done it on a bona fide knowledge of the labor. I know the labor for the goods; if it is not so much for pills to-day, it will be to-morrow. We can't estimate it exactly. It is not a possibility.

729. Q. Would it take twice as long to make two entries of cordial as one of pills?

Ans. No—yes, it would, of course. Can't you get at this question and facts without fooling your time away?

730. Q. Are you able to tell what would be the cost of the labor necessary to make the mass, manufacture the pills, put them in the boxes, put on the seal with red or green wax, wrap them with directions and the label?

Ans. No, sir.

731. Q. Why not?

Ans. Because I never knew.

732. Q. Are you not able to make up such a statement from
547 your books of your expense in the business?

Ans. I don't know but what I ought be able to make up a statement of what kind, but it would be an indefinite one.

732. Q. Why have you not done it in making up this account?

Ans. Because I was not required. I have made up the cost from my books, and endeavored to get the cost and sales there, and found, since I made it, it was greater than I first put it down.

733. Q. Do you have any person especially engaged about making the pills?

Ans. I have now; I did not have then. For the last year I have had two girls who do nothing but make one pill, because my sales are greater.

734. Q. Is the expense the same now that it was then?

Ans. No.

735. Q. How is it different?

Ans. We make more.

736. Q. Does it cost more to make a gross now than it did then?

Ans. No; the girls are better posted and understand their business. I have a machine now that I can save a hundred per cent. of labor.

548 737. Q. Do you use the same material now you did then?

Ans. Yes, sir.

738. Q. Can't you tell now what the expense incurred by the employment of these two girls was?

Ans. I can't tell now what they cost.

739. Q. Can't you from the account of them now tell what the comparative cost is?

Ans. No, sir.

740. Q. How many persons have been employed in the whole manufacture from the beginning?

Ans. I could not tell you.

741. Q. Now?

Ans. I could not tell you.

742. Q. How much do you mix in one mass?

Ans. Forty-two pounds.

743. Q. How long would it take a person to mix it?

Ans. Nearly a day.

744. Q. How much would they be worth?

Ans. I could not tell you.

745. Q. Don't you know what his wages are a day?

Ans. Yes.

746. Q. What are his wages?

Ans. $15.00 a week.

549 747. Q. How much would it cost to manufacture the mass into pills?

Ans. I don't know. I will have to see when I get my machine, and how long it took. I can't tell whether I had any machine in the latter part of 1872, or whether it run in 1872, and if I was running it in the old way I could tell how many girls it takes to make a batch. That is all included in the store expenses.

748. Q. How long would it take on' person to make the pills out of that mass?

Ans. I could not tell you.

749. Q. Can you arrive at that by an inspection of your books in any way?

Ans. No, sir.

750. Q. Can you by guess?

Ans. Yes.

751. Q. Have not you done it already?

Ans. No, sir.

752. Q. Can you by experiment?

Ans. Yes.

753. Q. Haven't you ever made the experiment?

Ans. No, sir.

754. Q. How many pills can a person make in a day?

550 Ans. I could not tell you.

755. Q. How much in an hour?

Ans. I could not tell you.

756. Q. How much would 42 pounds make?

Ans. I can't tell. I know how much a pound will make. It takes two pounds and a quarter for a gross.

757. Q. You don't know how long it will take to make up two pounds and a quarter?

Ans. No, sir.

758. Q. How many of these pills will a girl box up and wrap in a day?

Ans. I don't know. I did intend a ye r or two to put them out by contract, and I tried to do it and it became so obnoxious to my people, I stopped, & now work by the piece.

759 Q. Do they work by the piece altogether?

Ans. No; by the day; I meant to say day. Take that piece out,

760. Q. You say you don't know how much one hand can box up and wrap in a day?

Ans. No, sir.

Adjournment till to-morrow at ten.

JULY 21ST, 1874.

Pursuant to adjourment, the hearing of the case was resumed, as follows:

551 J. H. McLean.

Examination resumed.

I want to recall a question there of yesterday's. You asked me if the amount that I have charged here, $8.00, was correct, and I said according to this estimate that I have made there was a mistake; I found there was no mistake, that the cost of the pills is $8.00.

761. Q. (By M'r Gray.) This you are stating is a correction?

Ans. I arrived at that to ascertain that fact that when I made the estimate of the actual cost of the materials in the pills I took it per pound, and some of the materials I use is extracts, so when they dry into pills

there is the shrinkage. It covers the mistake I made and would leave the pills at $8.00 as the cost in making and manufacturing them, and my recollection is that years ago when I made the price that was the same rule, dry pills—and there was also powders and those that I have not calculated yesterday. In the manufacture we have a loss of materials, also powders, we use in the manufacture, and I had not calculated that before, and I see the price $8.00 per pound is correct.

552 762. Q. What are the books you have produced here?

Ans. The traveling agents' book, the ledger, and journal, the shipping book or order-book; I believe the order-book is the shipping-book.

763. Q. Have you no sales-book?

Ans. The order-book is the sales book.

764. Q. The commission-book?

Ans. This is the agent's book.

765. Q. The day book?

Ans. The order book is the day-book.

766. Q. The receipt-book or receipts for pills on commission?

Ans. This is the book—the traveler's book.

767. Q. The invoice-book?

Ans. That is the order-book.

768. Q. The agents' reports?

Ans. This is the agents' reports, it is called "Register of notes and receipts."

769. Q. Does that embrace the agent's reports?

Ans. Yes, sir.

770. Q. All of them?

Ans. All of it, I believe.

771. Q. Shipping-book?

Ans. That is the order-book.

772. Q. Account of labels or bills for labels?

Ans. It is in the ledger or journal.

773. Q. In both?

553 Ans. I want to state right here I know nothing of the books. I know the beginning and the ending of the books; I can't explain them in any manner, and don't intend to.

774. Q. The label accounts, you say, all in the ledger and journal?

Ans. Yes, sir; all I know of.

775. Q. The advertising-book, or books containing advertising accounts?

Ans. That is in the ledger and journal.

776. Q. Label-books or accounts?

Ans. Got none.

777. Q. Where does that account appear?

Ans. The account would naturally appear in the ledger & journal, I expect.

778. Q. Do you know?

Ans. No, I do not; I don't keep the books; I know I pay them.

779. Q. Have you any account of the laborers you employ and pay?

Ans. There is no doubt it is in the ledger and journal; everything goes there, as I understand bookkeeping; all cash paid out is there in the ledger and journal.

780. Q. Showing what it is paid for?

Ans. Yes, sir.

781. Q. How far can you identify these books otherwise?

554 Ans. I cannot identify them any more than I speak of; I make no entries in them.

782. Q. How can you identify them?

Ans. Are these your book' you have spoken of covering the period of time? (Referring to books before the witness.)

Ans. Yes, sir. Books marked "Journal C, D'r J. H. McLean," "Order-Book C, D'r J. H. McL.," and "Ledger C, D'r J. H. McLean," "Register of Notes and Receipts, D'r J. H.McLean," and index to the ledger journal, I suppose.

783. Q. Do those books that you have now specified and identified contain all your reference to the Universal Pill——

Ans. I could not tell you, I don't keep the books.

784. Q. Wait till I ask you. Do these books you have just identified contain entries showing the expense account of Universal Pill from 1870 to 1872, the amount sold, the amount on commission, and the amounts received therefor?

Ans. I don't know, sir.

785. Q. Have you other books that contain entries relating to these pills?

Ans. No; not that I know of. I think this would be all that is necessary from my book keeping.

555 786. Q. Were all the entries in your order-book?

Ans. I can't tell. I am not a bookkeeper.

787. Q. You say you don't know anything about that?

Ans. No, sir.

788. Q. Does the ledger or journal contain all the sales of the Universal Pills during this period?

Ans. That is my understanding.

789. Q. You say the order-book is your sales-book?

Ans. Yes.

790. Q. Do you know whether the entries in your order-book are transferred to your ledger or journal?

Ans. I can't tell you. I ordered my bookkeeper, and I can't tell whether he did it right.

791. Q. Does the journal show all sales?

Ans. It is my understanding it does.

792. Q. And the prices?

Ans. Yes, sir.

793. Q. Does it show also what was delivered on commission?

Ans. I don't know. My understanding is, that all that goes out of my store goes into my journal.

794. Q. Don't you direct the bookkeeping?

556 Ans. No; I would not know how. I can't keep books, and don't intend to.

795. Q. Don't you direct what shall go on your books?

Ans. No; I know what is sold, and know it goes on the books, properly kept. I could not keep books; I could not tell whether it should go in the ledger or journal. When I kept my own books I put it in the ledger.

796. Q. You don't profess to be a bookkeeper?

Ans. No, sir.

797. Q. (By the master.) When you speak of sending pills out on commission, do you pay a percentage to the man that sells the pills?

Ans. No. They take them at a certain price, and when we go back we settle with them. Commission goods is not for the purpose of profit. It is for the purpose of starting the business.

798. Q. When you sent out goods in this time under controversy, from November, 1870 on, in what form was the receipt given by the parties?

Ans. He signed that receipt (producing receipt). It was filled
557 up one dozen liniment; 1 doz. Universal Pill, and so on, and is returned to me as a voucher.

799. Q. Is that a paper such as you have spoken of as bills recoverable?

Ans. Yes, sir.

800. Q. The same as that?

Ans. Precisely.

801. Q. The same phraseology throughout?

Ans. Yes, sir; all two medicines added since that was not in. You will see it on the books transferred from one to another—Ex. Q.

(The paper referred to was marked "Exhibit Q.")

Counsel for complainant then asked that the following order be made:

"Ordered by the master, that be appointed bookkeeper to examine all books of the defendant, and ascertain from said books how many boxes of J. H. McLean's Universal Pills were sold from the 9th November, 1870, up to and including May 21st, 1872; to whom, and at what prices, and the amount received therefor. Also examine and ascertain the amount of said pills in the hands of travelling and other agents, and consignees and commission men, on 9th November,
1870, that were sold or accounted for on or after said date, and
558 what number of boxes of said pills were in their hands on the 21st May, 1872, and not returned afterwards. Also that he examine and ascertain how many of said pills that were in the hands of commission-merchants on November 9th, 1870, have been returned, and from whom, and at what time returned. Also that he examine and ascertain what has been the costs of the material used in manufacturing the Universal Pills, & the costs of manufacturing said pills, including boxes, printed directions, stamps, labels, wax-seal, paper boxes for dozens, and boxes for the gross.

"Also that he examine and ascertain the amounts of freight and extra expenses paid by defendant on Universal Pills returned to them from commission-men unsold.

"Also that he examine and ascertain the whole number of bottles of Strengthening Cordial, Candy Vermifuge, Vulcanic Oil Liniment, number of boxes of Universal Pills & Chinoidine Pills that were sold or put up by defendant between the above dates.

"Also that he examine and ascertain the whole expenses of
559 printing, of paper used in advertising in defendant's business from 9 Nov., 1870, to May 21st, 1872; and that he also ascertain if defendant's books will show what printing or advertising is charged to the Universal Pills during said period."

The master granted the order & appointed H. S. Driggs.

At this point the further hearing of the case was continued until 10 o'clock Friday, July 24th, 1874.

JULY 24TH, 1874.

The parties met and adjourned to Tuesday, July 28th, 1874, at ten o'clock.

JULY 28TH, 1874.

The parties met and adjourned to 10 o'clock, July 29th, 1874.

JULY 29TH, 1874.

Pursuant to adjournment the hearing of the case was resumed, as follows:

J. H. MCLEAN.

Examination resumed:

802. Q. (By M'r Gray.) State whether between November 9th,
560 1870, and May 21st, 1872, you made your pills with a machine or by hand.

Ans. I could not tell you.

803. Q. You say you don't know?

Ans. I don't know.

804. Q. How long would it take a man to make a batch of forty-two pounds into pills?

Ans. I could not tell you.

805. Q. Who did that work?

Ans. I could not tell you. I have employed a great many. I had no one, especially, at that time.

806. Q. You had a foreman.

Ans. Not at that time; I did all foreman's work myself.

807. Q. Between November 9th, 1870, and May 21st, 1872?

Ans. Yes, sir. I made all my batches at those dates, I think.

808. Q. You think you yourself did principally.

Ans. Yes, sir.

809. Q. If you were your own foreman during that time, cannot you tell who made the batches and who made the pills?

Ans. No.

810. Q. And you could not tell whether made by machine or by hand?

561 Ans. No, sir.

811. Q. You stated that you shipped pills every week or so to your travelling agents.

Ans. I did not so state.

812. Q. What did you state on that point?

Ans. I could not tell you what I done. The journal will show you what was done. All I know is what I referred to in the journal.

813. Q. I ask you what you did state on that point?

Ans. I could not state what I did state on that point; you did not ask me the question in that shape.

814. Q. Do you deny you said you shipped every week or so to your travelling agents?

Ans. I do; I can't tell.

815. Q. Did you so state in your deposition that was taken?

Ans. I don't recollect what I stated in the deposition in regard to those matters.

816. Q. I will ask you this: When you did ship to your travelling agents while on the road, were those shipments entered on the journal?

Ans. I don't keep the books; I can't tell.

817. Q. You swear you don't know.

Ans. I swear I don't know.

562 818. Q. Have not you stated heretofore, in your examination here, that all shipments, all consignments, and all sales, were entered in your journal?

Ans. That is what I intended should be, but I never entered them.

819. Q. What do you mean when you say you don't know whether they were entered?

Ans. I believe they were entered, you know, but when you ask me the question whether it was done, I know from the orders it was done.

820. Q. Was that your order?

Ans. My order was to enter every thing that comes from the factory, so we might know at the end of the year whether we are losing money.

821. Q. The question is, whether you direct your employees to enter in the journal every thing you sell and ship?

Ans. Yes, sir.

822. Q. And if the orders were obeyed, the shipments are entered?

Ans. Yes; that is my understanding.

823. Q. Is it true to the present time?

Ans. Yes, sir. I consider they obey my orders; if they did not, they would not stay there long.

563 824. Q. When a travelling agent starts and takes a lot of pills with him, are they entered?

Ans. Yes, sir; certainly; just as much as anybody else would do.

825. Q. In case of the travelling agent, in whose names are these entries made as to the party having possession of the goods?

Ans. I could not tell you.

826. Q. Is the entry made in the name of the travelling agent?

Ans. I could not tell you, but the books will show. I have not looked at these books or one of the accounts in the last five years. I never look at these entries.

827. Q. What were your directions?

Ans. My directions were to enter everything that goes out, and charge the party that takes them.

828. Q. The travelling agent?

Ans. Yes; I charge him directly with the pills.

829. Q. You bought the stamps you used on the pills and other manufactured goods?

Ans. Yes, sir.

830. Q. In what amounts did you generally buy them?

Ans. We bought them sometimes—at that time I don't know
564 whether I bought them by the $100.00 package; I buy them now by the $1,000 00.

831. Q. What discount do you get?

Ans. Ten per cent.

832. Q. What did you get then?

Ans. I can't recollect.

833. Q. Between May 21st, 1872, and November 9th, 1870?

Ans. It is too far back to recollect anything about that.

834. Q. When did you begin to get the discount?

Ans. I can't tell.

835. Q. Did not you get a discount in May, 1872?

Ans. I don't know whether I did or not.

836. Q. Do you swear you did not?

Ans. No; because my recollection does not go back that far.

837. Q. Do you mean to say on that point, or on everything, your recollection does not go back?

Ans. Everything. I could not think three months back in my business, and I don't intend to charge my mind with it.

838. Q. What is the percentage of discount that you get now?

565 Ans. I don't get no discount now. I get $1,100.00 of stamps for $1,000.00; that is not ten per cent.

839. Q. Did not you get $1,100.00 for $1,100.00 between these dates?

Ans. I could not tell you.

840. Q. You won't say whether you did or not?
Ans. I won't say whether I did or not.
841. Q. What quantities did you have to buy to get the discount?
Ans. $1,000.00.
842. Q. Who do you buy of?
Ans. I buy now directly from the government.
843. Q. Did you between those dates?
Ans. I can't tell. I did once buy from the revenue-collector, and then I had to pay the full price.
844. Q. Here in S't Louis?
Ans. Yes, sir.
845. Q. You have a proprietary stamp?
Ans. Yes, sir.
846. Q. Did you have between November 9th, 1870, and May 21st, 1872?
Ans. Yes. I know that, for I see it right here.
847. Q. Did you buy those from the collector?
Ans. I can't tell.
566 848. Q. Don't you know that all your proprietary stamps you got from Washington?
Ans. They come from Washington; they do so, most emphatically.
849. Q They are manufactured for you?
Ans. Yes, sir; they were sent to the collector and subtreasury; but now I get them direct from Washington.
850. Q. Have not you got the ten per cent. discount on all the proprietary stamps?
Ans. No, sir.
851. Q. When did you start with the proprietary stamps?
Ans. I can't tell.
852. Q. Did not you get that stamp made very soon after the use of stamps became necessary?
Ans. No; it was a long time afterwards.
853. Q. You can say whether you used it from November to May?
Ans. Yes, sir; because I see it on the labels.
854. Q. Don't you know you got that discount all the time from the time you used the proprietary stamp?
Ans. No; because it was a good deal of money to send them the $1,000.00 at the time I did it, and because of that I made arrangements to get them from parties and give them the discount when I saw proper.
567 855. Q. When you purchased in quantities of $1,000.00, did not you on such always get the discount?
Ans. When I got them direct from Washington, I did.
856. Q. Did you ever get them in quantities of $1,000.00 otherwise than from Washington?
Ans. I can't tell; I have got them many ways. I have tried many ways to save on them as well as I can in my business.
857. Q. You tried to save on them as much as possible?
Ans. Yes, sir.
858. Q. And if there was any way of purchasing whereby you could get a discount you adopted that way?
Ans. No; if there was any way I could make an arrangement with other parties to get the stamps from them without sending my money to Washington and have it stay thirty or forty days, I would make the arrangement with him. I used to send to Washington a $1,000.00, and it

would lay out of my business twenty or thirty days; that was why the discount was made.

859. Q. That ten per cent. discount is very good interest for thirty or forty days?

568 Ans. It depends on how you invest your money; sometimes I can make more than that in the time. It is a matter of dollars and cents to calculate.

860. Q. Look at that printed direction wr[illegible]pped about Exhibit K, and state whether that is the printed direction that was used all the time by you.

Ans. That is my understanding.

861. Q. Was it not often the case that only a half sheet was used?

Ans. No; it may have been years before it was used, but not at that time.

862. Q. Can you tell at what time that was issued?

Ans. No.

863. Q. There is no date or mark about it by which you can designate the time?

Ans. No; we don't take any dates, we print them just as they come up to use.

864. Q. (By M'r Reber.) Those printed directions November 9th, 1870, to May 21st, 1872?

Ans. That is my understanding. By having the label and altogether I suppose it was the case. They have them together. I don't know whether that direction was used all the time. It is impossible for me to tell.

569 865. Q. (By M'r Gray.) That is one of the printed directions you used?

Ans. Yes, sir.

866. Q. And which you did use?

Ans. Yes, sir; when I commenced during this time I can't tell.

867. Q. Is that box (Ex. K.) one of the boxes you used?

Ans. It looks like it.

868. Q. Open the box and state whether that is the manner in which you put up the pills during that period from November 9th, 1870, down.

Ans. I think so. It is my recollection.

(The advertisement and box referred to were marked in red ink "K.")

869. Q. And there was a time, if I understand you rightly, when you only used a half of one of those sheets.

Ans. Yes, sir; around the box of pills along many years before; I don't know how many years before. When I first commenced my pills I required a small amount of paper as I could use, and I could not afford to use as much paper as I do now.

870. Q. Did you between the 9th of November, 1870, and the
570 21st of May, 1872, use but the half of that printed direction?

Ans. I don't think I did.

871. Q. I don't know, Doctor, that I certainly remember what your statement was in reference to the printing of the directions, by whom they were printed.

Ans. Do you want me to answer?

872. Q. Yes.

Ans. My recollection is that M'r Wiebusch printed th[illegible]m printed directions that go around Exhibit K.

873. Q. And in regard to the labels, by whom were they printed?

Ans. I think they were printed in my store.

874. Q. Can you say how that was?

Ans. I could not tell.

875. Q. You can't say, then, whether the label, Exhibit K, was printed in your store or out of it during the interval from November 9th, 1870, to May 21st, 1872?

Ans. No; that was too long ago.

876. Q. If printed out of it, where was it printed?

Ans. I could not tell

877. Q. Look at Exhibits E^1, E^2, and E^3, marked "C. P. Ellerby, notary," attached to the depositions in this case of William G. Taylor
571 & Michael L. Hurt and state what those exhibits *exhibits* are (handing papers to witness).

Ans. My almanacs—D'r J. H. McLean's Family Almanac.

878. For what years?

Ans. 1871, 1870, and 1872.

879. Q. Are there any other exhibits attached to that deposition?

Ans. There are some directions there.

880. Q. Whose directions are they?

Ans. My directions; they all belong to me.

881. Q. I will ask you to look at the other exhibits attached to the same depositions, Exhibits D 1, D 2, D 3, D 4, and state what they are.

Ans. They are directions, almanacs, and circulars, and other advertising material that I have.

882. Q. When did you use those exhibits, D 1, D 2, D 3, and D 4?

Ans. One of those directions, I think, was used in 1864 or 1865.

883. Q. Which?

Ans. The one marked 74 Chestnut street was used in 1864 or 1865; my recollection is the number changed then; all the balance was used at that time and still continues to be used.

572 884. Q. And that one you did not use from November 9th, 1874, to May 21st, 1872?

Ans. My recollection is we did stop using it in 1864 or 1865. I changed my number on the directions when the city changed the number. I have the data to lead me to think I used it in 1864 or 1865. That one is D 3, with the number 74 Chestnut street.

Cross examination:

1. X Q. (By M'r Reber.) In reference to the sale of pills, does the amount of sales and the amount of business depend to any extent, and what extent, on the advertising?

Ans. No; you can't tell; you may advertise for ten years and make a small amount of sales, and the next year make a large sale and make up for that. Our advertisements this year may go two or three ahead, and if we don't sell this year we make them sell next year.

2. X Q. In selling a patented medicine or a trade-mark medicine, is it usual to advertise it?

Ans. Must do it; must do it.

3. X Q. Then what is the object in advertising, if you don't increase the sales?

Ans. It does increase the sales; of course it increases the sales.
573 You could not sell the medicine without advertising, for that is the point in the business.

4. X Q. Where a party has a patented medicine to sell, is it customary or uniform to advertise to bring it before the public?

Ans. He must, or he would not sell a dollar's worth.

5. X Q. If a party, then, has a medicine which he wishes to sell, what is the practice in regard to advertising?

Ans. Commence advertising at once.

6. X Q. If you have an article that is uniformerly advertised, is advertising a legitimate part of the expenses of the business?

Ans. Certainly; it is necessary.

7. X Q. In advertising the Universal Pills, if I understand your testimony right in your examination in-chief, did not have the advertisements exclusively with reference to the pills, but in connection with the other medicines?

Ans. Always; all my directions, all my advertisements, all my labels—not all my labels but all my advertising matter—contains not only pills, but other medicines, and not only other medicines, but pills. There is scarcely a sheet without it.

574 8. X Q. So your advertising and printing and paper accounts don't show what the advertising of each particular medicine costs?

Ans. No; because they are advertised in one sheet and every sheet.

Re-examination:

885. Q (By M'r Gray.) You say without advertising you would not sell a dollar's worth of your pills.

Ans. No, sir.

886. Q. You have just stated so.

Ans. I state it again.

887. Q. Now, does the amount of sales depend on the amount of advertising?

Ans. I should say altogether. If you want me to qualify it, I will qualify it.

888. I have asked you the question and you have answered it.

Ans. There are some places that require more advertising than other places, and some people require more language to convey them idea than other people does. It is not always alike.

889. Q. Still the rule, as a general rule, holds true, that the amount of sales depends on the amount of advertising?

Ans. Yes, sir; as a general rule.

890. Q. Does not the advertising done in one year assist in sales in subsequent years?

575 Ans. I could not answer that correctly.

891. Q. What is the object of advertising if you don't know that it does assist?

Ans. I only take it from time to time. I advertise $50,000.00 worth this year, and I calculate to take the proceeds this year and not another year.

892. Q. You don't consider advertising this year is any advantage to the sales another year?

Ans. I did not say so.

893. Q I asked you the question whether advertising done in any one year did not assist the sales in subsequent years?

Ans. I could not answer that.

894. Q. I mean the following years after the advertisem nts?

Ans. I could not answer that; I am not giving you opinions.

895. Q. You have an experience that enables you to say?

Ans. I have had a great deal of experience, but not enough to state facts.

896. Q. From that experience what would you say as to the advertising of one year contributing to make sales in the following years?

576 Ans. If you ask me the opinion I can give it to you, but I can't give you facts.

897. Q. I have asked you the question.
Ans. I can give the opinion; I think it does.
898. Q. You have been advertising these pills some twenty years?
Ans. Twenty-two years.
899. Q. What was the first medicine you started?
Ans. I put up in my own name, the first medicine was pills.
900. Q. What pills?
Ans. D'r J. H. McLean's Universal Pills.
901. Q. What was the next medicine?
Ans. Volcanic Oil Liniment.
902. Q. The next?
Ans. Really, I can't tell. The next, I think, was Strengthening Cordial, some years afterward.
903. Q. About what year did you begin the Strengthening Cordial?
Ans. I can't tell; a year or two after the other.
904. Q. Could you fix the date?
Ans. No.
905. Q. Could you fix the date for the liniment?
Ans. Yes, sir; I think in 1852; in fact, I know it was; I was looking to see about it.
577 906. Q. The cordial after that, but you can't fix the date?
Ans. Yes, sir; it was a year or two after that. It was a family classed together.
907. Q. They were not born twins, but born one after another?
Ans. Yes, sir; after I got money.
908. Q. After the cordial what was the next medicine?
Ans. Candy Vermifuge was the next.
909. Q. What year did you start that?
Ans. I could not tell you that.
910. Q. What was the next?
Ans. My Chinoidine Sugar Pills.
911. Q. What year did you start that?
Ans. I could not tell you.
912. Q. The sales of patent medicine, I understood you to say, depended almost entirely on the advertising?
Ans. Yes, sir; can't be otherwise.
913. Q. Does it depend on the length of time of advertising or extent of advertising?
Ans. I could not tell you, I have many ways of advertising.
914. Q. I would like your opinion as to whether it depended on
578 the length of time it is advertised, the number of years, or whether it depends on the extent as to whether largely advertised or not.
Ans. If you are asking me about all medicines I will answer that.
915. Q. I ask you generally as to medicines.
Ans. Some medicines don't require much advertising, and some require a great deal of advertising before you can bring them into reputation.
916. Q. Which is the kind that takes but little?
Ans. I could not tell you.
917. Q. Take your own medicines.
Ans. I think the cordial has required less advertising than either of the others.
918. Q. Which requires the most?
Ans. I have advertised more for the pills than any other medicine I

have got, because I have advertised them together and sold less of the pills.

919. Q. It don't commend itself?

Ans. Fleming was selling his pills on my reputation.

920. Q. You think your advertisement helped him?

Ans. Yes, sir; he sold thousands for it.

921. Q. Notwithstanding he began ten years before you?

579 Ans. He says he did.

922. Q. Have the sales of the Universal Pill been increasing or diminishing since you first started them?

Ans. I could not tell you. I never took account of them.

923. Q. You don't know whether they have increased or diminished?

Ans. I have never questioned the fact.

924. Q. I ask you whether you know?

Ans. I don't know.

(Counsel for defendant objected to this examination, on the ground that it had been gone over before.)

925. Q. Do you make the statement that it has increased sixty or seventy fold since 1872?

Ans. I make that statement as an opinion; I have never questioned how many boxes went out.

926. Q. Whatever went out were entered in your journal?

Ans. Yes, sir.

927. Q. Of course that would show how the fact is?

Ans. Yes, sir.

580 HENRY WIEBUSCH, being duly *duly* sworn as a witness on the part of the plaintiff, testified as follows:

1. Q. (By M'r Gray.) You are one of the firm of A. Wiebusch & Son?

Ans. Yes.

2. Q. You are the son?

Ans. Yes, sir.

3. Q. What is the business of A. Wiebusch & Son?

Ans. Printers and binders.

4. Q. Did you, as early as November 9th, 1870, do printing for J. H. McLean?

Ans. Yes, sir.

5. Q. Down to how late since that time?

Ans. Up to the present date.

6. Q. How long before 1870?

Ans. I could not tell.

7. Q. Did you as far back as the beginning of 1870 or 1869?

Ans. Yes, sir.

8. Q. Did you print almanacs for him?

Ans. Yes, sir.

9. Q. Any other printing?

Ans. Yes, sir.

10. Q. What other printing?

Ans. Such as directions, labels, streamers. I have done printing like Exhibits E 1, E 2, E 3, and D 1, D 2, D 3, D 4, attached to the

581 deposition of Taylor & Hants.

11. Q. Were these almanacs printed by your house?

Ans. As much as I can recognize them, I have done printing like them. I think I have done those.

12. Q. Look at them, and see if you can identify them.

Ans. Yes, sir; I think I done the printing.

13. Q. How many of the almanacs did you print in each year?
Ans. I could not tell.
14. Q. Would your books enable you to tell?
Ans. No, sir.
15. Q. Have you any means of ascertaining?
Ans. I could not ascertain how many I done for each year, and not the exact amount.
16. Q. Could you ascertain the exact amount you did for three years, 1870, 1871, and 1872?
Ans. No, sir.
17. Q. Did you do it by contract, or charge what your price was?
Ans. By contract.
18. Q. Were the contracts in writing?
Ans. I could not tell. Sometimes it has been in writing, and sometimes not.
582 19. Q. What was the cost of almanacs by the thousand; or how did you print them?
Ans. By the thousand.
20. Q. What was the cost of the thousand?
Ans. There are various prices.
21. Q. Take 1870.
Ans. I could not tell by heart.
22. Q. Can you tell for 1870, 1871, or 1872?
Ans. I could not tell the exact price.
23. Q. Could you by an examination either of papers or books?
Ans. I guess so.
24. Q. Can't you tell now what you did get for almanacs of that description by the thousand?
Ans. I stated I got various prices these three years.
25. Q. State these various prices.
Ans. I could not give no exact prices.
26. Q. What do you mean by saying you can't give the exact prices?
Ans. I don't know them.
27. Q. Did you make the contract, or your partner?
Ans. No; I made it.
28. Q. Will your books show you what was paid you for the almanacs by the thousand?
Ans. Yes, sir.
29. Q. What labels did you print?
583 Ans. Different.
30. Q. Did you print such labels as that? (Exhibit K, label on box, shown witness.)
Ans. No, sir.
31. Q. Never at any time?
Ans. No.
32. Q. Nor your house?
Ans. No, sir.
33. Q. You are a practical printer?
Ans. Yes, sir.
34. Q. Lithographer too?
Ans. No, sir.
35. Q. Did you ever print labels similar to that?
Ans. No, sir.
36. Q. Did you or your house print that? (Handing witness printed direction around box, Exhibit K, itself marked "K" in red ink.)
Ans. Yes, sir; I think so.

37. Q. Did you print it by contract, or what was paid you for printing that?

Ans. Various prices.

38. Q. State some of the prices?

Ans. I could not tell you; I could not state that the way I am here.

39. Q. You would require to examine your books or papers to ascertain?

Ans. Yes, sir.

584 40. Q. By examining your books or papers could you ascertain what you were paid during 1870, 1871, or 1872 by D'r J. H. McLean for printing directions like that?

Ans. I could to some extent.

41. Q. How were you paid for the directions, by the thousand?

Ans. No, sir.

42. Q. How were you paid?

Ans. We were paid in different ways.

43. Q. What do you mean by different ways, some by the thousand and some by the sheet?

Ans. No; at certain times, or sometimes, D'r McLean would furnish the paper and authorize us to do the press-work; at other times he would tell me to look after the directions and see there was a sufficient quantity on hand, and I would supply the paper.

Sometimes you furnished the paper and done the work, and you got a certain price?

Ans. Yes, sir.

44. Q. And you did the work and he furnished the paper?

Ans. Yes.

585 45. Q. Can you by examination tell what you were paid when you furnished the paper and done the work?

Ans. I could in the general.

46. Q. What do you mean in the general? Can't you tell the price you were paid by the thousand when you furnished the paper?

Ans. No, sir.

47. Q. Or by the ream?

Ans. I could by the ream.

48. Q. I asked you in the first place how you were paid, whether by the thousand, and I understood you to say you were paid by the thousand?

Ans. I did not say so.

49. Q. State the different ways you did the work and were paid; I understand you have already stated you furnished the paper and did the work?

Ans. Yes, sir.

50. Q. And in another case D'r McLean furnished the paper and you did the work?

Ans. Yes, sir.

51. Q. Were there any other different ways than these two?

Ans. I think not; not my recollection.

586 52. Q. I understand by an examination of your books you can ascertain when you furnished the paper and did the work. How were you paid then, by the thousand or by the ream?

Ans. By the ream. Are you not referring to the pills or printing in general?

53. Q. I am referring to the printed directions, Exhibit K. I put the question in reference to the printed direction, and you mean to be

understood as saying, as to some of these you furnished the paper and did the work?

Ans. When I answered the question in regard to directions, it was on directions in general; I never had an exact price for printing Universal Pill directions.

54. Q. Are there any specific differences between Universal Pill directions and the others?

Ans. The pill directions are done at the same time the other directions are done.

55. Q. Are they all the same size and the same printed matter?

Ans. As near as I can make them.

56. Q. Do you get the same price for the directions that go around the pills and go around the other medicines?

587 Ans. Yes, sir.

57. Q. How was the work in printing the printed directions, like Exhibit K, computed in your charges against D'r McLean? How did you make the charge, by the ream or number?

Ans. It just depended on how the things would be; if D'r McLean furnished the paper I would charge him so much a ream for the press-work; and the other way, charge him for the paper and press-work for so many reams.

58. Q. Your books would show the charges you made against D'r J. McLean for press-work and paper during 1870, 1871, and 1872?

59. Q. The amount of charges can be seen from your books?

Ans. It will show the charges by the ream.

60. Q. Whether he furnished, or you, the paper?

Ans. Yes, sir.

61. Q. It would also show the number you furnished him?

Ans. Of directions in general.

62. Q. Will they not show the number furnished for the pills?

Ans. No, sir.

63. Q. It will show the number for all his medicines?

Ans. Yes.

588 64. Q. And they would show whether they got the same price or a different price for the directions of the different medicines?

Ans. I don't understand you.

65. Q. Whether your books will show whether you were paid the same price for directions for the pills, and for cordial, Chinoidine Pills, vermifuge, & liniment; whether the directions were all paid for at a like price, or whether you got a different price for the different directions?

Ans. No; they would not show it.

66. Q. If you got different prices it would show?

Ans. I stated there was different prices paid *different prices paid* in general.

67. Q. At different times?

Ans. Yes, sir.

68 Q. Do you mean to say there were different prices paid for directions that went around the Universal Pills, and for directions that went around the cordial and vermifuge and liniment? Do you mean to say there were different prices paid for different directions?

Ans. No, sir.

69. Q. You mean you got the same for printing directions for all medicines?

589 Ans. Yes, sir: in printing directions for D'r J. H. McLean, for his different medicines, we are governed by the demand for them;

and at one time we take more directions for one medicine than the other kind. We have a large sheet of paper which will take all his medicines on. I think the liniment is excluded. We take the largest paper, as the press-work is the same on a small sheet as a large sheet, and arrange the matter economically, and then cut the sheets up, sometimes into four, six, eight, or ten parts.

70. Q. What determines the number of parts into which you cut it?

Ans. Candy Vermifuge has, until of late, used only half the paper of what the other medicines did.

71. Q. You mean that the advertisement for the vermifuge is smaller in size than the other.

Ans. It would be the same size, but would require half the paper; this takes two leaves.

72. Q. How is it with the other medicines; are the directions for the other four medicines all the same size?

590 Ans. I have excluded the liniment. I mention the liniment as not going on that sheet at all.

73. Q. That is not on the sheet at all?

Ans. No, sir.

74. Q. And yet, the liniment being off, you cut it into eight or ten parts?

Ans. Yes, sir.

75. Q. What determines the parts into which it is cut; is it the number of advertisements?

Ans. No; if I had the Candy Vermifuge direction on it I would have to take one more part; it only takes a single cap, and the pills take a double cap, and I could not tell about the other, whether they take one or two leaves.

76. Q. I ask how the other medicines, excluding the vermifuge, compare with this direction for the Univeral Pills?

Ans. The same size.

77. Q. They would be of the same cost, being of the same size?

Ans. The same cost.

78. Q. State whether from November 9th, 1870, to May, 1872, you have printed for D'r McLean anything besides these printed directions and almanacs.

Ans. Yes, sir; I state I did other printing, too.

79. Q. What is the other printing?

591 Ans. I could not enumerate it.

80. Q. Do you see any other?

Ans. I done a job like this, and receipts like those almanacs, as I stated, and directions also.

81. Q. Anything else?

Ans. Yes, sir. I done all the regular mercantile work.

82. Q. What do you mean by that?

Ans. Bill-heads, letter-heads, drug-tickets, shipping-receipts, shipping-tags, used in every business almost.

83. Q. Can you by examining your books tell the cost of the circulars and other articles of printing that you have done for D'r McLean; that is, what they cost by the ream or thousand, or however may have been the scale that you followed in charging for them?

Ans. About the first one I could not tell, because there was so many different kinds of receipts out. They were not classified; they were called just receipts and almanac orders. There is no special entry made of it. It is stated so many receipts, but whether medicine-receipts or other receipts I have not stated. The expense is about the same.

592 84. Q. What time do you mean by first? I understood at first you could not tell.

Ans. I did not mean to say at first. I referred to that paper when I spoke of the first; it is marked Exhibit D 1. I referred to that.

85. Q. You say in regard to that you could not tell the price at any time during any year?

Ans. Not for those.

86. Q. Can you for this circular, D 2?

Ans. To the best of my knowledge, as much as I can recall my memory, it has been entered under almanacs, circulars, or under that name; as much as I can recollect it was the same thing with this as with that; it his been circulars turned out at about the same cost, and then they were not classified because we could not find names for all the circulars. When the expense was the same we called them circulars.

87. Q. You mean they were the same expense and no difference between them?

Ans. Yes, sir.

88. Q. You could ascertain that expense?

Ans. Yes, sir.

593 89. Q. And you can ascertain whether you furnished the paper or D'r McLean furnished the paper, as to all these things, as to all the circulars?

Ans. I could not tell, because I fully know that there were entries against D'r McLean for so many reams of press-work; of what that press-work consisted, whether it was almanacs, circulars, or what it was, I could not tell. There was a given price for a ream of press-work, and by making monthly settlements you could always recollect to your memory, and have the receiving receipt for it, but on the bill, instead of specifying what it was, it was charged so much a ream of press-work, and no other items.

90. Q. What were these streamers you speak of?

Ans. Straps of paper six inches wide by twenty five inches long.

91. Q. What was printed on them?

Ans. The names of medicines; there was different sizes; I remember one size of it.

92. Q. When did you begin printing those?

Ans. I could not tell you.

93. Q. Would your books show?

Ans. It would be the same as I told you. It was press-work and paper, and press-work.

594 94. Q. Do you mean the names of the different medicines were on that strip of paper?

Ans. Sometimes.

95. Q. How was it used?

Ans. Pasted on fences, stables, and barns in the country, bridges, and so on. I think that was the intention they were got up for.

96. Q. Can you state the number of those directions that one ream would furnish?

Ans. No.

97. Q. Can you state how many in a sheet?

Ans. Sometimes eight and sometimes ten.

98. Q. Take that specific direction, how many would it furnish of that direction?

Ans. Sometimes four and sometimes eight, depending on what kind of paper.

99. Q. That depends, then, on the size of the sheet?

Ans. Yes, sir. I think only one or two of my presses would take in the whole sheet. When I would not watch out and have one large press empty I would use a small one.

100. Q. When you put them on a larger press did you use a large sheet or a small one?

Ans. Sometimes a large sheet and sometimes a half-sheet.

595 101. Q. You can ascertain how much a large sheet would make, and how much a small sheet?

Ans. I thought it was not my fault, and I would charge him for half sheets. I charged him as much for half sheets as whole sheets, for the number of times the press came down.

102. Q. Look at that printed direction around the cordial, marked "Exhibit 4," and state whether that is the printed direction that goes around the cordial of D'r McLean.

Ans. That is the purpose I printed it for. I never put it around, but I have seen it there.

103. Q. That is the kind you printed for him.

Ans. Yes, sir.

104. Q. How does the size of that compare with the printed direction of the Universal Pill?

Ans. Those were done at two different times. Sometimes we took smaller paper, and sometimes larger paper and what we have on hand. We can't wait for the mills to make it, and have to buy it here.

105. Q. My question is, how the direction of the cordial com-
596 pared with the direction for the pill.

Ans. Just about the same.

106. Q. Are your plates stereotyped?

Ans. I think they are all electrotyped.

107. Q. They are fixed?

Ans. Yes, sir; stationary type.

108. Q. Can you get as many of the cordial out of a sheet as you can of the other?

Ans. Yes.

109. Q. That is the one around the Vulcanic Oil Liniment? (Handing paper to witness.)

Ans. Yes, sir.

110. Q. Are the directions around the fifty and twenty-five cent size, each size of the liniment, of the same size?

Ans. I have only printed one kind. Those are all of the same size.

111. Q. How do they compare with the direction for the Universal Pills?

Ans. They don't go in with that, as I stated before. I excluded the liniment.

112. Q. They don't take the impression at the same time?

Ans. No, sir.

113. Q. My question is, how do they compare in size?

Ans. You see (holding up the two together).

597 114. Q. You mean to say these for liniment are larger size than the Universal Pill?

Ans. Yes, sir.

115. Q. How many more of the directions for the pills can you get out of a sheet than of the directions for liniment?

Ans. It depends on what kind of paper I use for liniment. I have used various papers for that.

116. Q. Suppose you use the same size you do for the Universal Pill?

Ans. I could not use it.

117. Q. Do they cost the same or different?

Ans. It costs just as much to run off. My work I charge the same.

118. Q. How is it with the paper?

Ans. Just as I stated before, it depends on what kind of paper. I have used job lots of paper. I pick up cheap. I have run off more as the size was larger than the other, 24×36, and I got up a lot of paper 46×50, and I have a little off, and I could not state any quantity it would turn off.

119. Q. Could you by looking at your books?

Ans. No, sir.

598 120. Q. Could you state the comparative number of the different directions for the different medicines you have printed?

Ans. No; I stated the same thing before, I think.

121. Q. Comparing the two directions, one for Universal Pills and one for liniment, was not the one for liniment a half-size larger than for the Universal Pills?

Ans. It is quite a narrow-sized paper.

122. Q. You see they are not the same size?

Ans. Yes, sir.

123. Q. How do they compare; how much larger is one than the other?

Ans. I don't understand you.

124. Q. How much larger is this than the other?

Ans. Just as much as you see here.

125. Q. You are a printer?

Ans. Yes; I take odd sizes of paper beforehand. How much larger the sheet of paper is depends on what kind of paper I am using.

126. Q. You can tell by looking at your books what you pay for paper?

Ans. I know it is charged.

599 127. Q. There is some way you get at the value when you charge D'r McLean?

Ans. Yes, sir.

128. Q. I am asking you about the one for the liniment now here before you.

Ans. You want to know the price of the liniment, too?

129. Q. You think you can separate the liniment from the other?

Ans. Yes, sir. I don't know whether I could separate the other. I thought, I remember, as I stated before, there was a charge for press-work in general, and whether that relates to candy, vermifuge, chinoidine, or any other directions, I can't say.

130. Q. Can you, by examining your books, ascertain any one instance where in printing the directions for the Universal Pills you furnished the paper and did the work what the whole cost by the ream was?

Ans. Not the Universal Pills alone.

131. Q. Can you for all medicines, the liniment being kept outside?

Ans. In most cases.

132. Q. Can you in any one instance ascertain the cost of the different directions by the ream?

Ans. Yes, sir; just what I have got down here. The general

600 charge for printing them is $2.00 a ream, including paper?

133. Q. Including paper?

Ans. It depends on the market price of paper. The rate is from $4.00 to $4.60.

Cross-examination:

1. X Q. (By M'r Reber.) In printing circulars I understand you that you used electrotypes or electrotype plates?

Ans. Yes, sir.

2. X Q. And you printed circulars on sheets and half-sheets of paper. The different circulars on the sheet or half-sheet of paper, would they always be the same, or would the circulars on the different sized sheets of paper be different? Would you make changes?

Ans. I don't understand you.

3. X Q. Where you printed a full sheet and had right directions, would all the directions be the same?

Ans. There would be a change nearly every time.

4. X Q. Every separate direction might be different from the other setts?

Ans. Yes, sir.

5. X Q. You say they are electrotype plates. Do you have two electrotype plates that are just exactly the same?

601 Ans. Yes, sir; we can run off a full sheet of cordial directions.

6. X Q. Then, in making up your accounts for printing, there is no account made of the changes?

Ans. No. In cases we might run off seven parts of the eight in cordial, and not to let the stock of the pills run down we would put in one, some years ago; they may have been cordial directions, but I would not swear it. We know it is all one class.

Adjourned till two o'clock.

JULY 29TH, 1874.

H. R. DRIGGS, being duly sworn as a witness on the part of the complainant, testified as follows:

1. Q. (By Mr. Gray.) Will you state whether you are a bookkeeper?

Ans. I am.

2. Q. And understand bookkeeping?

Ans. Yes, sir.

3. Q. State whether you have examined any of D'r McLean's books.

Ans. I have.

4. Q. What one?

Ans. The cash-book, journal, and ledger.

602 5. Q. Have you examined to ascertain the number of D'r J. H. McLean's Universal Pills that have been sold or disposed of, as shown by his books?

Ans. I have, sir, for a certain period.

6. Q. What period?

Ans. November 9th, 1870, May 22nd, 1872.

7. Q. Have you a statement showing what you found in the books?

Ans. Yes, sir.

8. Q. What is the result—the amount?

Ans. I find pills sold from November 9th, 1870, to May 22nd, 1872, taken from the journal, 1,377½ gross, at an average price of $14.74, $20,320.20. I also find from the books during that time that there were sales made to the amount of $20,310.82 between the same dates of all kinds of merchandise. The items are not designated at all.

9. Q. I ask you whether you ascertained the total amount of sales during the period between those dates of all medicines?

Ans. The total amount of sales, which I give in detail, of all the medicines during those dates, $275,627.50; add to that the cash and other sales not given in detail, $20,310.82, and we have an aggregate of $295,938.41.

603 10. Q. Did you ascertain the percentage or ratio of the sales of the Universal Pills to the total amount of sales, and fix the portion of the Universal Pills in the $20,310.82?

Ans. If the sales of Universal Pills were the same proportion in the $20,310.82 as in other sales, the amount of sales would be $1,497.37; per gross it would be 101½ gross. This, added to the 1,377$\frac{9}{12}$, would be *would be* 1,479$\frac{3}{12}$; at average price of $14.74, a gross would be $21,817.57. I also found in freight on goods sold and discount made on bills——

11. Q. Did you look for freight on Universal Pills returned during that period?

Ans. I did not find anything.

12. Q. Did you look for it?

Ans. Yes. I found freight on goods sold and discount on bills $8,076.13; merchandise returned, $363.90. That is entered in the journal $8,440 03; deducted from the gross sales, $295,938.41, it would leave $287,498.38 for net sales. If the proportion for discount and freight was the same for pills, it would be $622.23 for the pills; deduct this from the amount sold of pills, $21,817.57, and we have the net sales, $21,195.34, at an average price of $14.30. I find quantities of other goods

604 sold as follows sold and given in detail in the journal—I have not taken the cash sales, because I could not find the details of those: Sales of the Universal Pills, 16,533½ doz.; Vulcanite Oil Liniment, small packages, 19,339 doz.; medium, 3,655 doz.; large size, 828$\frac{4}{8}$ doz.; Candy Vermifuge, 3,356 doz.; chinoidine, 471½ doz.; cordial, 24,947 doz.; aggregate, 69,130.$\frac{4}{12}$.

13. Q. Have you made any further examination?

Ans. I made an examination as expenses.

14. Q. Have you made an examination of the defendant's books to ascertain the expense for paper and printing in advertising?

Ans. It is rather difficult to find those, exactly, in paper and printing account. Some large items are credited to Wiebusch & Son and Louis Schnaider—they are the principal items; and in Wiebusch's account the items are not given. I cannot tell what the amounts were paid to them for from the books furnished to me. It is charged to printing and paper.

15. Q. Have you got any facts in reference to what the books show as having been paid for printing?

Ans. The books show a large amount paid to A. Wiebusch &

605 Sons, but don't state what it was for. It is simply charged in the paper and printing account, and I can't say it was for paper and printing, but I suppose it was.

16. Q. What do you say as to Schnaider?

Ans. There are some items of Schnaider's that there is nothing mentioned as to what they were composed of, though the larger portion is mentioned as paper.

17. Q. Have you ascertained, or, assuming that all that is credited to Wiebusch & Son, & Schnaider, and others, as being for paper and printing, have you ascertained the amount as shown by the books as paid for printing and paper during that period?

Ans. If all the amount paid to Wiebusch & Son and Schnaider was for printing or paper, or both, and other parties of which I have the details here, the total amount charged in the ledger between November 9th, 1870, and May 22nd, 1872—there is none in November before the 26th, and in May it closes on the 18th—is $67,289.13.

18. Q. Did you find any other entries of payments for printing or paper than those you have included there?

Ans. No, sir.

606 19. Q. Did you look for others?

Ans. Yes, sir.

20. Q. And that paper embraces all you found that appears to be for paper or printing, and as to portions that it does not show, but you have assumed it when paid to Wiebusch & Son to be for printing, and when paid to Schnaider to be for paper?

Ans. Yes, sir.

21. Q. Did you examine the books for the purpose of finding the cost of the material and the manufacture of the Universal Pills?

Ans. I did, sir. I find the expense of all the business was kept together, so far as I could find.

22. Q. Could you, then, learn from the books what the Universal Pills cost?

Ans. No, sir.

23. Q. Either what the material by itself cost or the labor in manufacture, or what the boxes or printed directions and labels cost?

Ans. None of them, sir.

24. Q. Did you look to see if you could find these things?

Ans. I did.

607 25. Q. Did you examine the books with a view to ascertain what the paper and printing expenses of these Universal Pills were during that period? Did you look to see whether you could learn from the books what the actual expenses of printing and paper was expended on the Universal Pills?

Ans. I did.

26. Q. Did you find what it was?

Ans. I did not.

27. Q. Did you find any entries from which it could be ascertained?

Ans. No; I did not.

28. Q. Did you ascertain an average price at which the Universal Pills were sold?

Ans. I did.

29. Q. How did you get at that?

Ans. By finding the amount for which they were sold and the quantity sold, and dividing the amount by the quantity.

30. Q. Did you find the sales at a uniform price or various prices?

Ans. It varies somewhat; wholesale prices are different from retail.

31. Q. Did you look at the cash book?

Ans. I did.

608 32. Q. Did you find any entries of sales of Universal Pills in the cash book?

Ans. They were entered as sales without giving the items.

33. Q. You found nothing of that name?

Ans. No, sir.

34. Q. Did you look up the expense for stamps?

Ans. Yes, sir.

35. Q. Have you any papers from which you can tell the amounts in which the stamps were purchased?

Ans. In about $1,000.00 lots. I state from memory. I have not the books here or any memorandum.

36. Q. The result you have stated here you have on paper?

Ans. Yes, sir; in pencil.

37. Q. I will ask you if you have a memorandum of the amount paid in 1870, 1871, and 1872 for United States proprietary stamps?

Ans. I have.

38. Q. What is the total of each year?

Ans. 1870, $16,505.60. I have taken this from the balance of the account. For 1871, $13,661.57; for 1872, for the whole, $14,805.45. That is simply the face of the account.

609 39. Q. Making a total of what?

Ans. 44,971.62 for the three years.

40. Q. The reference to that account, did you make an examination to see how much was paid for stamps from the 9th of November to the end of the year?

Ans. I did not; from the beginning of the year to the 21st of May, I did not.

41. Q. What was the expense of material and manufacture of the Universal Pills by the gross or dozen or any other way? Could you find it?

Ans. No, sir.

42. Q. You looked for that?

Ans. Yes, sir, and could not.

43. Q. I understand you to say you could not find the expense of the separate materials—boxes, printed instructions. Whether you examined to find the cost of the materials or labor used in the manufacture of the Universal Pills?

Ans. Yes, sir.

44. Q. Did you find anything?

Ans. No.

45. Q. Did you look for the cost of the boxes?

Ans. I did.

610 46. Q. The boxes, printed directions, and labels, could you find anything as to the expenses of either of the items or gross cost?

Ans. I could not find the items so as to ascertain the expense of the items in the pills, or the gross cost of the pills either.

Cross-examination:

1. X Q. (By M'r Reber.) At whose request did you examine the books and give the results which you have stated here?

Ans. At the request of M'r Shippen. Some of these results I gave of my own accord, and others may have been suggested, one or two of them by M'r Gray.

2. X Q. What matters were you requested by Master Shippen to examine and report on?

Ans. There is a memorandum (referring to order made by the master).

3. X Q. The first item is as to the amount of Universal Pills sold from November 9th, 1870, to May 21st, 1872. You have examined and have given the result as appears by the book as to that item?

Ans. Yes, sir.

4. X Q. What book or books did you examine?

Ans. The ledger, cash book, and journal.

611 5. X Q. I have here a paper in my hand composed of a number of sheets, headed "Sales of Universal Pills Journal." Is this the account of sales which you derived from the journal?

Ans. It is.

6. X Q. What is the total amount of sales as appears by the journal?

Ans. 377$\frac{9}{12}$ gross, the amount opposite that summed up at the end.

7. X Q. In what form is the entry of these sales made in the journal?

Ans. In regular form, charged to different parties, and made with other goods, a good many of them.

8. X Q. Are the entries made in the same way uniformly?

Ans. Yes, sir, I think so; I did not notice any particular difference.

9. X Q. This paper, then, is a true copy of all the sales as you found them in the journal?

Ans. Yes, sir.

10. X Q. Did you examine, or were you instructed to examine, whether there were any of these Universal Pills sent out on commission; and, if so, whether there is any entry on the books of that subject?

612 Ans. Not as far as I could see.

11. X Q. (By M'r Gray.) As to the first part of the question, as to whether you were instructed to examine as to commission goods?

Ans. I believe so.

12. X Q. (By M'r Reber.) Whether you were instructed to do so or not, did your examination of the books enable you to state whether any goods had been sent out on commission that may not have been included under the head of sales; or, in other words, whether any goods appeared to have been sent out on commission?

Ans. Not so far as I could see.

13. Q. As far as you could see, did not all the Universal Pills that were sent out seem to go out as sales?

Ans. Appeared so.

14. X Q. In your examination of the books with reference to the sales, you considered them all as absolute sales?

Ans. I did.

15. X Q. You were not instructed that some of those goods may have been sent out on commission; and, if so, to trace through the

613 books and ascertain, if you could, what had been realized on the goods?

Ans. So far as the books show that would be almost an impossibility. Parties familiar with the accounts might know they had not been sold, and when returned would be credited to the parties, but it would be impossible for one not familiar to do it.

16. X Q. You did not examine to see if they had been sent out on commission, and what was received for them?

Ans. I only examined the books furnished me; I did not examine any other books to see that they were out on commission.

17. X Q. You did not examine any book with that aim?

Ans. No.

18. X Q. Were the agent's books furnished to you by the defendant?

Ans. They were not.

19. X Q. Were they not shown to you?

Ans. No, sir.

20. X Q. Were they not offered to you for your examination?

Ans. No; I saw the receipts receivable book; it is balanced as

614 profit and loss. I have a memorandum of that.

21. X Q. The agent's books is the receipt receivable book. Suppose that a part of the so-called sales in your account were goods sent out on commission and accounted for in the recepts receivable book, you have not looked at the receipts receivable book and see if they were closed up?

Ans. I have looked at the receipts receivable book. The account is kept open and it is credited or charged to profit and loss as the case may be; I have a memorandum of that, showing a loss of $9,000.00. From the face of the book it would appear it is bad debts.

22. X Q. If a part of these items which you have put down as sales in this account were in point of fact conditional sales, as goods sent out on commission, you are not able to state from your examination how

these commission accounts were closed up, and how much money was received on the commission goods. Your examination has not enabled you to state that.

Ans. No; I can't state that in detail. I can state how much
615 appears to be lost on bills receivable account each year. That is the only thing I can state.

23. X Q. You have here, as taken from the journal, sales amounting to 1,377.9½ gross at $14.74, making a total of $20,320.20; you have carried that forward to the next page, and then you have this memorandum, "Add estimated sales for cash, and other sales not included above 101½ gross, which added to the other makes 1,497$_{\frac{3}{4}}$ gross, making a grand total of $21,817.50." How do you arrive at this 101½ gross, estimated sales?

Ans. I find in the cash sales and sales made by travellers on the road, in other words, where the sales were not reported in detail, no statement made of the items, 20,310.82 from November 9th, 1870, to May 21, 1872. If the sales of pills bear the same proportion in this amount as they did in the journal of the whole amount, the sales of pills would be 101 gross, at 1,497.37. It is simply an estimate.

24. X Q. You mean, if the sales of pills continued to bear the same proportion to the aggregate sales of all the merchandise, then there must have been 101½ gross more sold of the pills than what
616 you found in the journal?

Ans. Exactly.

25. X Q. This 101½ gross is a mere conjectural result?

Ans. It is.

26. X Q. How do you know that there were any more pills sold than the 1,379.9½ gross?

Ans. I don't know.

27. X Q. There is nothing in the books to indicate it?

Ans. No; I just simply made that as an estimate.

28. X Q. You simply conjecture, because it was merchandise, that some of the merchandise must have been pills?

Ans. May have been.

29. X Q. You put it down as must have been as absolute?

Ans. I think I have put, if the sales bear the same relation.

30. X Q. The coming at this 101½ gross in making your calculations from sales of general merchandise, what merchandise did you take into your account? Every sort of merchandise sold by D'r McLean?

617 Ans. The journal stated the total sales made during that time were $275,627.59; if the pills sold in cash and other sales bore the same proportion to the whole that the pills sold in the journal do to the total amount of sales in the journal, then the amount would be so.

31. X Q. Do you know what kind of merchandise D'r McLean sold?

Ans. He sold his Cordial, Liniment, Chinoidine Pills, Vermifuge, and in a few instances I noticed he sent out and got goods to fill orders. I noticed a very few cases of insignificance.

32. X Q. Don't the books show he dealt in other merchandise than that you have mentioned?

Ans. I think not.

33. X Q. They don't show it?

Ans. I think not.

34. X Q. Except in one or two instances?

Ans. Yes, sir.

35. X Q. The aggregate amount of merchandise from which you produce this result of 101½ gross, you took from the journal?

Ans. I did.

36. X Q. Did you use the cash-book in that connection?

618 Ans. Not at all; I had the statement of the pills from the journal, and could not make the proportion any other way.

37. X Q. In ascertaining the amount of the sales of any of the merchandise, you did not use the cash-book in that connection with a view to ascertain the amounts?

Ans. It was used to some extent in finding out the cash sales.

38. X Q. Did you rely on the journal entirely to show the sales of merchandise, or did you use the cash-book?

Ans. I used the cash-book and journal, and the sales made in the cash-book are in the ledger and journal.

39. X Q. Sales made in the cash-book, would they be in the ledger?

Ans. No; sales made in the cash book, made by the man Durkee; he would credit merchandise by sales of Durkee, one trip, and he would carry it out—eleven or twelve hundred dollars in one trip, and it is included in the $20,000.00. There are a few of them.

40. X Q. The first item I find in the account of sales of Universal Pills, taken from the journal, in your memorandum, is under No-

619 vember 18th, T. Foot 2 gross, $15.00; $30.00. That item you found in the journal as a sale?

Ans. Yes, sir.

41. X Q. And charged up as a sale?

Ans. Yes, sir.

42. X Q. Did you stop there, or did you go further to see whether Foot had paid for the two gross?

Ans. I did not see whether he had paid for it. I made a memorandum of all the accounts, so if bad debts were made they must come in their account as profit and loss. I did not go over each account in detail, but it must show in merchandise, in profit and loss. If it is open yet, it stands as an obligation of Foot.

43. Q. Have you examined the whole of the books to see how the books did close up—how much went in profit and loss?

Ans. Yes, sir.

44. X Q. And how much was returned to merchandise, have you examined that?

Ans. Yes, sir. If those receipts receivable were returned instead of bad debts they must be charged to profit and loss.

45. X Q. The profit and loss account which you took up is a

620 profit and loss account of the whole business?

Ans. Yes, sir.

46. X Q. Not of the Universal Pills?

Ans. No; it would be impossible to separate it. If a man buys a bill of goods of all of the different articles and pays a certain portion of it it, would be hard to allot it to the pills.

47. X Q. If the loss of the business was sufficient, one-half of the pills might be lost without the books showing?

Ans. If the loss on pills was out of proportion it would not show.

48. X Q. How can you ascertain how much money D'r McLean realized out of those so-called sales; suppose a large portion of the sales were goods sold on commission, how can you ascertain, without tracing each item of the commission goods, how much he received in gross?

Ans. That I can't tell; the accounts were left open; they may have staid open a year and a half or two years, and they may have them open now; nobody could tell from the books.

49. X Q. You could not tell from the books?

621 Ans. No; it appears as a sale, and was an obligation.

50. X Q. What was realized from that does not appear on the books?

Ans. We might single out one particular one; the account might be open to-day.

51. X Q. You did not examine the items in detail and see how much was realized on each sale?

Ans. No, it would be impossible to do so. If he sold nothing but the pills it could be done, but, as it is, if he was paid a certain amount on the face of the bill it would be hard work to tell what to credit the pills.

52. X Q. I understand you that the paper and printing account shows that Dr McLean paid $67,289.18 between November 9th, 1870, and May 21st, 1872.

Ans. For printing and paper.

53. X Q. That he paid for printing and paper $67,289.13; that is the total of the printing and paper account?

Ans. It is not the total as the book shows, but it is the total of printing and paper as shown by the account. There are other items chargeable in that account not strictly paper and printing.

622 54. X Q. What is the amount of those items?

Ans. I think probably $10,000.00.

55. X Q. Don't your statement show?

Ans. No; I think I have a memorandum showing the account.

(Counsel for plaintiff objected to the witness being examined, touching the printing and paper account, as to items not embraced in his (defendant's) account filed before the master or called for by the plaintiff under the two heads of printing and paper. The master overruled the objection, and plaintiff excepted to the ruling of the master.)

56. X Q. Look at your memorandum, then, and state what result you have.

Ans. The printing and paper account for 1870, $33,974.97; the total account for 1871 is $49,790.80; total account for 1872, $55,342.09.

57. X Q. At what period in 1872 does it stop?

Ans. It takes the whole year 1872. I took the proportionate cost and have prorated the account. Heavy bills may have been paid the

623 last or first part of the year. The prorata for 1870, 52 days, is $4,840.27; the item embracing the whole of the year 1871, $49,790.80. The prorate for 140 days in 1872 is $21,378.72, making a total cost for the whole time, $76,009.79. The first account was not to represent the whole account.

58. X Q. Does your memorandum show, or does your memory enable you to state, what items go to make up the difference between the $67,000.00 and the total amount you have given?

Ans. It was mostly freight on almanacs, and I noticed one or two amounts of tin signs. I think nearly every item was freight on almanacs.

59. X Q. I understood you that you were not able to ascertain from the books the cost of the material and manufacture of the Universal Pills?

Ans. No, sir.

60. X Q. Did you examine the expense account in that connection?

Ans. I examined the expense account; yes, sir.

61. X Q. Did you examine it with reference to the cost of the pills?

624 Ans. I examined it and found there was nothing in it to show

for what the work was done; as to what particular item of expense it was for nothing is said.

62. X Q. You also stated that you could not ascertain the cost of the labels, &c., on the pills?

Ans. Not from the books.

63. X Q. I find here among your memoranda a paper which has the date of 1870, 1871, and 1872, and gives losses, bills receivable $11,200, receipts receivable $1,819, personal account $2,031.59, making a total of $15,050.50 prorate loss on sales

64. X Q. Did you arrive at these results from the books?

(Counsel for plaintiff objected to this as not being called for by the plaintiff, or as part of the account filed by the defendant, or of the examination asked for by the plaintiff.

The master overruled the objection, and plaintiff excepted.)

65. X Q. You obtained the data and then made the prorate from your calculation?

Ans. Yes, sir.

625 66. X Q. You took the data on which you made the pro-rata calculation from the books?

Ans. I did.

67. X Q. The amount of the loss you have stated here on this memorandum?

Ans. Yes, sir.

68. X Q. Going then to 1871, I will ask you to look at that paper. (Handing paper to witness)

(Counsel for plaintiff objected to the examination as being outside of the items of the account and outside of the examination directed to be made. The master overruled the objection, and plaintiff excepted to the ruled.)

69. X Q. Did you make out that paper, Exhibit X Y?

Ans. I did.

70. X Q. Did you make it from the books of the defendant?

Ans. I did.

71. X Q. Are the results there correctly stated as far as you are able to state them?

Ans. They are.

626 72. X Q. You have already stated in reply to my question as to the losses for 1870; state whether there was a loss in 1870, and what amount?

Ans. Loss, bills receivable and receipts receivable and personal account, $15,050.50.

73. X Q. Look at the account for 1871, and tell the master how that stands.

Ans. 1871, bills receivable showed a profit of $28,999.62, receipts receivable a loss of $9,022.57, personal accounts a loss of $1,423.79, the net profits of the three accounts, $18,553.26; all of this goes in the profit and loss account every year.

74. X Q. Passing to 1872?

Ans. Bills receivable showed a profit of $7,218.11; receipts receivable and personal accounts are not balanced but carried forward, and prorating this it gives $3,024 67; as the total sales made for the whole year are to the sales made before May 21st, so is the total amount here to this.

75. X Q. I will ask you whether you examined the books and made a statement of all the matters asked for by the counsel for the plaintiff?

Ans. Yes, sir; I think so. Some items I could not find, such as cost of materials.

627 At this point the examination was adjourned until Friday morning at ten o'clock.

JULY 31ST, 1874.

Pursuant to adjournment the parties met and the hearing of the case was resumed.

HENRY WIEBUSCH.

Examination resumed:

134. Q. (By M'r Gray.) Have you looked up those points?

Ans. Yes, sir; the first thing you want me to look up is the amount and cost of all almanacs in 1870, 1871, and 1872. The amount is 11,711,785 of almanacs.

135. Q. For the three years?

Ans. Yes, sir.

136. Q. What are they for each year?

Ans. Amount or cost?

137. Q. If you have any order in making the statement, go on and make it; my idea is, you were to ascertain what they were in each year?

Ans. Yes, sir; but I could not tell what they were for. I could not tell how many were for each year, but I can tell how much I delivered. I am delivering one year for another year. I am delivering this year for this year and next year.

628 138. Q. State what you have there?

Ans. 1870, 3,218,700 delivered; 1871, 4,103,510; 1872, 4,389,575.

139. Q. What did they cost per thousand?

Ans. Press-work $3.00 a thousand, but that don't include all the costs for me.

140. Q. What is the other cost per thousand?

Ans. I mean to say that the press-work at that time has been three dollars a thousand, but that don't include any setting up of type, changeing of different languages, &c., and other expenses, in the way of getting up these things.

141. Q. What were you paid by D'r McLean, per thousand, in each of these years?

Ans. Three dollars.

142. Q. Was that for one year or three years?

Ans. For three years.

143. Q. Who furnised the paper?

Ans. In most of cases D'r McLean.

144. Q. Can you tell what portion or how much of the paper he furnished?

Ans. He furnished the greater part of it, with some exceptions,

629 which I furnished.

145. Q. How much did you furnish?

Ans. I don't know whether I could tell, but I find charges on my books charging D'r McLean with so many pounds of paper, but I don't know what it was used for. I find some specified, which I can give you.

146. Q. We are now on the almanacs.

Ans. I can't give any exact figures on them. I find one charge of $120.50 on paper. I find another charge of $54.40, and one of $635.40.

147. Q. All these for paper?

Ans. Yes, sir; I have not looked them up very close, as you did not put any question to that effect.

148. Q. You understand we wanted to know the cost of what D'r McLean paid you?

Ans. I have got here what he paid for almanacs, but not paper. There is no question to that effect. I made it up as I had an idea of it myself.

149. Q. What kind of paper do you have him charged with?

Ans. Printing paper.

150. Q. The same as used in almanacs?

630 Ans. That I could not tell.

151. Q. Did you use different kinds of printing paper?

Ans. I charged him with wrapping paper so many hundred pounds.

152. Q. Does the charge show the rate per pound?

Ans. No, sir; simple items, so many pounds of paper so much.

153. Q. Don't show how much a pound?

Ans. I can make that out. I can't tell whether used for almanacs or anything else.

154. Q. Could not you tell from the price charged what kind of paper it was?

Ans. No, sir.

155. Q. Do printing and wrapping paper have the same price?

Ans. Very low classes of printing is the same as good kind of wrapping paper in many instances.

156. Q. Do you know what kind of paper you use in printing the almanacs?

Ans. Yes, sir.

157. Q. What was the cost of that paper?

Ans. That I could not tell.

158. Q. You furnished some of it yourself?

Ans. Yes, sir, at that time.

631 159. Q. What did that cost per ream?

Ans. That varied considerably in price because of different qualities, different sizes, and different weights.

160. Q. You mean to say the almanacs were of different quality?

Ans. No; the paper used for them.

161. Q. I mean the paper used for the almanacs. Do you say it was different qualities?

Ans. The paper was; yes, sir.

162. Q. Some was a better quality than others?

Ans. Yes, sir; and one of different size from the other.

163. Q. The almanacs were of different sizes?

Ans. The paper used for them.

164. Q. You mean some of it was bought as entire sheets and *and* some as half sheets?

Ans. No, sir.

165. Q. Would that make any difference in the cost of the paper?

Ans. Yes.

166. Q. Would it in the almanacs, counting it in almanacs so much per thousand of almanacs?

Ans. Yes, sir; the charges to him would be so much more.

632 167. Q. You understood what we wanted to get at was to find the cost of almanacs; was not that what you understood?

Ans. You wanted to know the cost of almanacs as far as I was concerned?

168. Q. As far as you know or could ascertain?

Ans. Yes, sir.

169. Q. Have you ascertained what was the cost of the paper that went in the almanacs?

Ans. Only a small amount; I ascertain that.

. Q. You of course know what kind of paper D'r McLean furnished ?

Ans. Yes, sir.

171. Q. Do you know the quality and character of it?

Ans. Yes, sir; about.

172. Q. Don't you know what it was worth, or what the market price was?

Ans. No, sir.

173. Q. Did you deal in paper?

Ans. No, sir.

174. Q. In what kind of paper?

Ans. I am not a dealer.

175. Q. Did not you buy paper for printing purposes?

Ans. Yes, sir.

633 176. Q. Of the same kind and quality?

Ans. That I could not tell. I don't know what kind of paper has been used four years ago.

177. Q. You handled it and printed it, didn't you?

Ans. Yes, sir.

178. Q. Why don't you know what kind it was?

Answer. Because I don't remember any more what quality of paper and what weight it was, what the market-price of paper was at that time.

179. Q. Look at Exhibits E 1, E 2, E 3, being almanacs of 1870, 1871, and 1872, and state, if you know, what is the cost of such paper as used in those almanacs?

Ans. I don't know.

180. Q. Can you tell for what price you would furnish and print almanacs in the quantity you have named; what price you would charge per thousand, furnishing the paper and doing the printing of such almanacs in 1870, 1871, and 1872?

Ans. I could not.

181. Q. What were these exhibits in 1870, 1871, and 1872 worth

634 by the thousand as they are furnished in quantities you have stated for those years, including paper?

Ans. I could not tell; I don't know the price of paper.

182. Q. Did not you buy such paper during those years for printing purposes?

Ans. I had to some extent. D'r McLean bought the paper.

183. Q. What was the cost of the paper you actually did furnish?

Ans. I could not tell how much it was a thousand.

184. Q. Can't you ascertain without your book?

Ans. No, sir.

185. Q. Won't your books show what you paid for it?

Ans. I furnished the paper for D'r McLean to some extent, but I could not tell how much it was per ream, how much it weighed, and what it was used for. Some has been used for almanacs, the books show, and some does not.

186. Q. That used for almanacs, what did that cost?

Ans. I could not tell.

187. Q. Would not your books show?

635 Ans. To the best of my knowledge, my books will not show what the expense of that paper has been on a special lot.

188. Q. It will show that.

Ans. I believe it will; I could not tell, certain.

189. Q. Why did not you look that up?

Ans. I have got here what he paid for almanacs, but not paper. There is no question to that effect. I made it up as I had an idea of it myself.

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188. Q. It will show that.

Ans. I believe it will; I could not tell, certain.

189. Q. Why did not you look that up?

Ans. Because I had no idea you would want that. paper.

190. Q. What was your idea? Was not your idea we were tryin of it get at the cost of the almanacs—both the material and labor?

Ans. The question was to ascertain the cost of the almanacs in 187 1871, and 1872—how much.

191. Q. That includes the paper.

Ans. I stated I used some paper for different purposes, and some for almanacs.

192. Q. Your statement of the proposition is what we want to know, the cost of the almanacs as furnished, which, of course, covers the expense of paper and printing. Did you try to ascertain that?

Ans. As far as possible.

636 193. Q. Have you had any conversation with D'r McLean in reference to furnishing those items?

Ans. No, sir.

194. Q. At no time?

Ans. No, sir.

195. Q. Since the adjournment?

Ans. No, sir.

196. Q. In no way?

Ans. I went to his office, and make regular office calls.

197. Q. Do you say you have had no conversation with him as to what you should furnish?

Ans. Not in the least.

198. Q. Has not he said to you what he wanted you to furnish?

Ans. No, sir.

199. Q. Or what you should not furnish?

Ans. No, sir.

200. Q. How many years have you been in the same business you are now in?

Ans. Something like twenty years.

201. Q. You do all sorts of printing?

Ans. Not all sorts, but in general.

202. Q. All sorts like these almanacs and labels?

637 203. Q. Do you ever print labels?

Ans. Yes, sir.

204. Q. Did you ever print any for D'r McLean?

Ans. Yes, sir.

205. Q. What kind?

Ans. Different kinds.

206. Q. That don't specify them. Name them.

Ans. I could not.

207. Q. Can't you name any kind?

Ans. Yes, sir. I might name one-tenth or one twenty-fifth of them. D'r McLean's business is so extensive.

208. Q. You say you have printed labels of different kinds. Now I ask you to name one of the kinds you have printed.

Ans. I printed labels for to go on his almanacs in fifty-packages.

209. Q. What else?

Ans. I printed labels for boxes.

210. Q. What kind of boxes?

Ans. Liniment boxes.

211. Q. What sort of boxes?

Ans. Much as I know, twelve and three dozen boxes.

212. Q. Any other?

Ans. Yes, sir.

213. Q. What others?

Ans. I can't recall them to my memory now exactly. I printed ɔels for cordial-bottles—called labels, in many instances.

214. Q. Do you mean the outside wrappers?

Ans. No; labels to go on the bottle. You see it there.

215. Q. You mean the printed matter pasted on the bottle?

Ans. Yes.

216. Q. Any outside labels?

Ans. No, sir.

217. Q. Any outside labels to any of his medicines?

Ans. Except to the liniment, to my knowledge.

218. Q. You have printed the outside labels to the liniment?

Ans. Yes, sir.

219. Q. Any of the vermifuge?

Ans No.

220. Q. Cheioidine Pills?

Ans. No, sir.

221. Q. Universal Pills?

Ans. No, sir.

222. Q. Do you do any lithographing in your establishment?

Ans. No, sir.

639 223. Q. Can't you tell us the cost of those almanacs in the shape you see those for these different years, or any one of these years?

Ans. No, sir.

224. Q. Can you form an opinion?

Ans. Not right; but I could think.

225. Q. How many sheets of printing paper would it take to make one of these almanacs?

Ans. Half a sheet.

226. Q. Of course a whole sheet would make two?

Ans. Yes.

227. Q. Don't you know what the price of such paper as these almanacs were printed of was in 1870, 1871, and 1872?

Ans. No, sir.

228. Q. What else were you asked to inquire into?

Ans. Price of directions 1870, 1871, and 1872, including as far as possible paper and press-work.

229. Q. What was the result of your examination in reference to directions?

Ans. 587 reams.

230. Q. Do you mean you used so much paper in printing directions?

640 Ans. Yes, sir.

231. Q. In what time?

Ans. Three years.

232. Q. What did those reams cost, if you know?

Ans. I find him charged $4,785.26.

233. Q. Charged for what; the paper or work done?

Ans. Paper and press-work combined.

234. Q. You mean for that you furnished 587 reams and printing them in the form of directions you received $4,785.26?

Ans. Yes, sir.

235. Q. How many sheets in a ream?

Ans. 480 sheets.

236. Q. How many pill-directions would one of those sheets make?

paper.
Ans. I could not tell you. of it

237. Q. I mean on the idea the whole sheet was printed in pill-di tions?

Ans. I could not tell.

238. Q. Do you mean to say you can't tell if the whole sheet wa printed?

Ans. Yes, sir.

239. Q. What was the size of the reams?

Ans. Size of the paper? Different sizes.

240. Q. How many of the different sizes?

641 Ans. That is not given. My books don't state that; don't state any size at all.

241. Q. What were the different sizes?

Ans. I could not tell the different sizes. I can only *only* remember that different sizes—quite different in size—have been used.

242. Q. Don't you know what the different sizes were?

Ans. No, sir.

243. Q. Can't you tell how many sheets they would make?

Ans. No.

244. Q. How many pounds were there there in 587 reams?

Ans. That I could not tell. Weight is according to the size.

245. Q. Don't your books show?

Ans. No.

246. Q. Did you look to see?

Ans. No; they would not show.

247. Q. How did you buy that paper? How did you pay for it? By the pound or sheet?

Ans. As much as I can remember, we sometimes paid by the pound and sometimes by the ream.

248. Q. You say, "As much as you remember." Don't you remember?

642 Ans. I don't remember the weight of the reams.

249. Q. Then there was no uniform mode of buying?

Ans. No.

250. Q. Can you specify any one size of these different reams?

Ans. One size is 20 x 42.

251. Q. How many would that sized sheet make of these printed directions, Exhibit K?

Ans. Eight; not counting the waste.

252. Q. What would this size—28 x 42—cost per pound by the ream?

Ans. How much would it cost now?

253. Q. How much would that size—28 x 42—cost per pound by the ream at that time?

Ans. I could not tell you.

254. Q. In either one of those years?

Ans. I could not tell you.

255. Q. At this time?

Ans. It depends on the weight, of course.

256. Q. What would it cost by the pound in a ream of that size—28 x 42?

Ans. How much it would cost now?

257. Q. Yes.

643 Ans. I can't see how I can answer that. There has been several qualities of 28 x 42 used, and whatever quality you want me to give the price on I could not give.

258. Q. Give the prices of the different qualities such as you find here.

Ans. The present price I understand you to say.

259. Q. That is what I ask you. I ask you for those years, and you can't say. Now I ask you the present price?

Ans. Paper is ranging now from nine to eleven cents.

260. Q. What would a ream of that size—of the kind of Exhibit K—weigh?

Ans. I could not tell exactly.

261. Q. Well, you can tell about, can't you?

Ans. About forty to forty-five pounds.

262. Q. One sheet you say would make eight printed directions?

Ans. Not counting the waste.

263. Q. What is the waste?

Ans. That varies from eight to ten per cent.; it may be more.

264. Q. Might it be less?

Ans. In some instances.

265. Q. From eight to ten per cent., more or less; is that what you mean to say?

Ans. Yes, sir.

644 266. Q. Supposing the quality like Exhibit K and the cost to be from nine to eleven cents a pound, a ream from forty to forty-five pounds, what would be the cost of that style of directions on a ream of that paper?

Ans. That is easy to make out.

267. Q. Will you figure it?

Ans. I wish to be understood in giving the amount of directions and the cost of them that this has been only applied to directions in general. I thought that was fully understood the last time, because you are applying to pill-directions. I don't want to be understood as only going to pill-directions.

268. Q. You specified a sheet of 28x42. Now I make the inquiry as to the number of directions of this K that you could get out of a ream of paper of that size?

Ans. The next thing is how much the paper cost.

269. Q. Take it that way, if you choose. A ream of that quality?

Ans. Well, take the average run, so much per ream, so many pounds, and so much per pound, it brings it $4.[illegible].

645 270. Q. For what?

Ans. The paper.

271. Q. Of that quality and size?

Ans. Yes.

272. Q. $4.25 would be the cost of a ream 28x42 and the quality of K?

Ans. The average present price.

273. Q. How many of these directions can you get out of a ream of that size?

Ans. 3,500.

274. Q. What would the printing of that ream into directions like K cost?

Ans. Now?

275. Q. In 1870, 1871, and 1872?

Ans. I don't know.

276. Q. What would it cost now?

Ans. Average from two to two and a half a ream.

277. Q. What do you mean by that; $2.00 to $2.50 a ream?

Ans. Yes, sir.

278. Can't you tell which it will be?
Ans. That depends on the quality and other things.
279. Q. I am talking of one size ream?
Ans. It depends on the quantity of the order.
646 280. Q. In such quantities as you printed for D'r McLean?
Ans. I would rather say $2.50 and $3.00.
281. Q. The smaller quantities would be less?
Ans. Would be more.
282. Q. (By Mr. Rober.) You are speaking of the price now or in those years?
Ans. The present price.
283. Q. (By Mr. Grav.) How does the price of the present time compare with the price of 1870 and 1872?
Ans. Price for what?
284. Q. For printing just the matter of printed labels.
Ans. In some cases it was the same. In some cases there are variations.
285. Q. I am talking of this case, of this kind of printing, K.
Ans. That I could not tell exactly.
286. Q. You could give no idea?
Ans. Not exactly.
287. Q. You can't say whether more or less now than it was then?
Ans. No; it might be the same.
288. Q. If different, how great is the difference?
Ans. It might vary fifty cents on the ream.
647 289. Q. Would it vary more than that?
Ans. It might be.
290. Q. You were in business then?
Ans. Yes, sir.
291. Q. Doing the same kind of work?
Ans. About.
292. Q. In 1870, 1871, and 1872?
Ans. Yes.
293. Q. Printing these identical directions?
Ans. Yes, sir.
294. Q. Can't you now tell whether your prices were more or less in 1870, 1871, and 1872, than they now are?
Ans. No; I could not tell, because I have not looked it up.
295. Q. Then you could tell by looking it up?
Ans. I might be able.
296. Q. Your books will show what your price for that kind of printing was in those years?
Ans. They show how much the paper and press-work has been charged to D'r McLean, but what item has been it does not show.
297. Q. Do you mean to say that you can't tell *whether* a very
648 small fraction what the expense of printing these directions was in 1870, 1871, and 1872?
Ans. No; I could not tell.
298. Q. Then you mean to say, with your actual experience of doing that work in 1870, 1871, and 1872, you can give us no idea as to what it cost?
Ans. No exact figures.
299. Q. Can you within five per cent. or ten per cent.?
Ans. As I stated before, the work has been averaging all the time.
300. Q. What was the average? Give us the average.
Ans. I mean not averaging, but changing. I have sent out and

bought paper for D'r McLean in job lots; and also, unexpectedly, he run out of directions, and had to pay a better price. I took better paper, and his has been changing.

301. Q. Give us the different prices.

Ans. I could not.

302. Q. What did you pay when you bought at the mill?

Ans. I don't know.

303. Q. You were buying such kind of paper and printing all the time, were you not?

Ans. Yes, sir.

649 304. Q. Printing for other people?

Ans. Yes.

305. Q. You bought stock and had it on hand, as you had orders to print?

Ans. Yes, sir.

306. Q. Can't you state from the books what it cost those years?

Ans. I have bought——

The MASTER. Answer the question.

Ans. I could not know. I will give you an explanation, if you want it.

307. Q. Can't you tell about what it cost?

Ans. No, sir.

308. Q. You have fixed the price of paper, 28x42, at nine to eleven *sheets*.

Ans. The present price.

309. Q. How did the price of such paper in 1870, 1871, and 1872 compare with the present price?

Ans. That I don't know.

310. Q. You mean to say you can't say whether it was more or less, or whether it has changed at all?

Ans. That I could not tell. An explanation will satisfy you, I think, and I have given one several times already.

311. Q. Your entire business is buying and printing paper, is it not?

Ans. Yes, sir.

650 312. Q. Can you give us the size of any other sheet of printing-paper, a part of that 587 reams that you used in printing for D'r McLean in 1870, 1871, and 1872?

Ans. Yes, sir.

313. Q. Give some other sizes.

Ans. 24x36.

314. Q. How many directions like K 1 would be obtained from a sheet of that kind?

Ans. To the best of my knowledge it has not been used for that purpose.

315. Q. For what purpose was it used?

Ans. Liniment-directions, as much as I can remember.

316. Q. How many liniment-directions could you get out of a sheet of that kind?

Ans. Four.

317. Q. Then the liniment-directions are of a different size from Exhibit K 1?

Ans. Yes, sir.

318. Q. Are they larger or smaller?

Ans. Larger.

319. Q. Do they cost more or less?

Ans. They cost more.

320. Q. What ratio more—what proportion?
651 Ans. I will have to figure out that.
321. Q. Put it on the ream, for instance?
Ans. They would average $1.50 less per ream.
322. Q. Which?
Ans. The liniment-directions.
323. Q. You mean to say, being larger than K 1, they would cost less per ream?
Ans. Yes, sir.
324. Q. How do you explain that?
Ans. I stated it only gave four to a sheet.
325. Q. You mean to say the same number of liniment-directions would cost less than the same number of——
Ans. No, sir.
326. Q. It costs less to print larger size than small?
Ans. No; the sheet is smaller and weighs less.
327. Q. What would be the cost of the liniment-directions per thousand as compared with a thousand of universal-pill-directions?
Ans. As near as I can make it, the pill-directions or anything like that size cut out of 28×42 $2.00 a thousand, and those of the liniment would cost $3.50 per thousand.
328. Q. Anything of that size out of 28×42?
652 Ans. Yes, sir.
329. Q. And the liniment, how much a thousand?
Ans. A fraction over $3.00 a thousand.
330. Q. Can you name any other size of sheets used in this 587 reams?
Ans. Not with any great certainty.
331. Q. What other sizes are there?
Ans. As I stated before, I bought job lots.
332. Q. Made for this purpose?
Ans. 25×38.
333. Q. Any other size?
Ans. 29×44.
334. Q. Any other size?
Ans. Might have been used 30×43; I recollect something to that effect.
335. Q. There are such sheets?
Ans. Sometimes.
336. Q. You don't know whether there were any of that size?
Ans. No, sir.
337. Q. How many *filed* directions like K 1, can you get out of the size 25×38?
Ans. That has not been used for pill-directions.
338. Q. 29×44?
Ans. Same amount as 28×42.
339. Q. There is yet eight?
Ans. Yes, sir.
653 340. Q. Are these sheets of that size worth the same amount or different amounts?
Ans. Worth more, the large size.
341. Q. Of the same quality?
Ans. They weigh more.
342. Q. Then it would not be profitable to use these sizes?
Ans. They are only used in cases of necessity.
343. Q. It is true that generally K 1 was printed on a sheet 28×42?
Ans. Yes, sir.

170 you 344. Q. Would a sheet of that size cut up to the best advantage in cutting these directions?

Ans. Yes, sir.

345. Q. It would not be economy to use sheets of any other kinds?

Ans. Not unless job lots can be bought cheaper; odd lots can be had cheaper sometimes.

346. Q. Were such lots bought to make up the 587 reams?

Ans. I believe so.

347. Q. I' was cheap paper bought at cheap prices?

Ans. Not altogether, except in extra cases.

348. Q. Do you know that they were not bought at cheap prices?

654 Ans. Bought at the market rates, the majority of it; say the larger part of it.

349. Q. During that time?

Ans. Yes, sir; to the best of my recollection.

550. Q. This estimate you have made of the cost of the pill-direction, like K 1, out of the sheet 28×42; that covers both paper and printing, covers the whole cost?

Ans. To the best of my recollection, as much as I have been able to estimate here in a short time.

351. Q. Now, can you say during the years 1870, 1871 and 1872 this price of $2.00 per thousand was about the average cost of these printed directions like K-1?

Ans. I could not tell.

352. Q. Can you say whether that is the price you estimate them at the present time?

Ans. Yes.

353. Q. Can you say whether the price then was more or less than now?

Ans. I could not tell with any certainty.

354. Q. Suppose you were required to print 128,000 like Exhibit K 1, what would be your charge per thousand on them in that quantity?

655 Ans. Before giving any figure on that, I would estimate very carefully, as my custom is.

355. Q. Can you make that careful estimate now of the price at the present time? I will change the question. What are directions like Exhibit K 1, worth by the thousand, supposing the order to be for 128,000, to be delivered within a year, the work to be done as convenient to you?

Ans. I would take several things into consideration.

(Counsel for defendant objected to the question as not throwing any light on the matter of controversy. The master overruled the objection, and the defendant excepted to the ruling.)

WITNESS. The price of them would be the same as I stated, about, but for the reason they could be done at my leisure and convenience there would be a little thrown off on it. The price I stated before was $2.00.

356. Q. That covering the paper and printing?

Ans. Yes, sir. I forgot one thing. I have not allowed any

656 waste in printing-paper and counting. I am not used to making my estimates so fast.

357. Q. What would the waste be?

Ans. Say ten per cent. It depends entirely on the run of the paper, how the presses are run, and so on.

358. Q. Estimating it ten per cent., that would make them cost how much?

Ans. $2.20, and allowing, maybe, for the convenience of turning them out in the time.

359. Q. How much would you allow for that?

Ans. That I could not answer at once. That depends entirely how a man is run in business.

360. Q. Take your own case in 1870, 1871, and 1872, putting it at that time.

Ans. I really could not tell what figure I would put on it. That is a hard question.

361. Q. Would it be ten per cent.?

Ans. It might be, but I would not say. There is a good deal of risk about that, and I would want to estimate over it, and take other things into consideration.

362. Q. Did you do this printing by the year for D'r McLean?

Ans. No.

657 363. Q. Did you do it by contract at all?

Ans. Not this.

364. Q. None of these printed directions?

Ans. No, sir.

365. Q. How did you do it, on special orders?

Ans. Yes, sir.

366. Q. Were they hurried orders when ordered, or what time was given you?

Ans. Sometimes in a hurry.

367. Q. How was it generally during these years 1870, 1871, and 1872?

Ans. That I could not tell. I know a good many orders came in in a hurry. Some of the orders I would have more time, and on some of them still more time, but to what extent the majority of the orders were I could not tell.

368. Q. Could you tell the price? Did you make any difference in your charges when you were ordered to do the work immediately or at your convenience?

Ans. I could not tell with certainty whether I did make any allowance, whether I made any charges for hurried orders or allowed anything for time orders.

369. Q. Was there anything else you were asked to look up?

658 Ans. I guess those were the two questions put by you, excepting, I believe, you want the gross amount.

370. Q. Have you got that?

Ans. $49,521.02.

371. Q. That is the gross amount of what was paid to you by D'r McLean?

Ans. Yes, sir.

372. Q. Between what dates?

Ans. I have not looked at the books to see between what dates it was paid. That was not the question.

373. Q. I mean from the 9th of November to May 21st. Was not that the question you were asked?

Ans. No, sir.

374. Q. What was the time?

Ans. Three years.

375. Q. From what date to what date?

Ans. January 1st, 1870, to the 31st of December, 1872.

376. Q. What was that paid for?

. Ans. Printing I done for him. I furnished printing articles and matter.

377. Q. Printing and paper you furnished?

Ans. Yes, sir; setting up types, and such like matters.

659 378. Q. How much of the sum was paid for almanacs?

Ans. $37,562.43.

379. Q. For three years?

Ans. Yes, sir.

380. Q. Was there any included in it, anything for almanacs for 1873?

Ans. Yes, sir; to a great extent; I don't know to what extent, but some extent.

381. Q. In the year 1870 what almanacs are included?

Ans. For 1870 and year following to some extent.

382. Q. Is that true, that in each of these years you included almanacs for the following succeeding years?

Ans. Yes, sir.

383. Q. To what extent in 1872, for instance, is included almanacs of 1873?

Ans. That I could not tell.

384. Q. These almanacs, were they not intended to be got out by the first of January of the year?

Ans. No, sir.

385. Q. Were they not got out long before the beginning of the year?

Ans. Part of them.

386. Q. What proportion?

Ans. I have no idea.

660 387. Q. What did you mean when you said to a great extent they were included in 1872 for 1873?

Ans. I corrected myself to a great extent. I think we did a larger part of the almanacs in the same as we did in the year previous. For instance, we may deliver more almanacs for 1875 in 1875 in the first month than we would do in the last three or four months of 1874.

388. Q. Still, would not they all be printed in the year preceding the year they were printed for?

Ans. No, sir.

389. Q. How early in 1870 did you begin printing for 1871?

Ans. I don't know. We are printing for 1874 and 1875 now.

390. Q. How early in 1871 did you begin printing for 1872?

Ans. I could not tell that either.

391. Q. How early in 1872 did you begin for 1873?

Ans. I could not tell you.

392. Q. Did you begin as early as the first of June, 1872?

Ans. I don't know.

661 393. Q. Don't you know whether you began six months before?

Ans. Four, or five, or six months, as the case may be; some years start sooner and some later.

394. Q. If you had started six months before 1872 for the almanacs of 1872, would not you have had them all printed for 1872 in that six months?

Ans. No, sir.

395. Q. Why? Because you could not print them in that time?

Ans. Yes, sir; we could not print them; and D'r McLean would not give us the paper, and we could not store the paper, or could he store the almanacs.

396. Q. For what was the difference? $49,521.02 is the total of the three years—paper and printing furnished.

Ans. Furnished by me?

397. Q. I mean between that and that amount, $37,000, for almanacs; what was the difference for?

What difference?

398. Q. The difference between those two sums paid you.

Ans. Something like $12,000.00.

399. Q. What was it for?

Ans. Order printing.

662. 400. What kind of printing?

Ans. Direction, partly.

401. Q. Partly for direction?

Ans. Yes, sir; and other advertising matters.

402. Q. How much for directions?

Ans. $4,785.26.

403. Q. What kind of directions?

Ans. All kinds of his medicines.

404. Q. How many medicines had he?

Ans. I believe six I printed for.

405. Q. How many had he from November, 1870, to May, for instance, 1872?

Ans. I don't know how many he had at that time. I will examine the exhibits. I believe five. Two came in since that—about that.

406. Q. What is the remainder of the sum paid to you?

Ans. For other advertising matter.

407. Q. What kind was it?

Ans. Such as labels, circulars, receipts, miscellaneous matter, streamers.

408. Q. Were there any other kinds than what you find here that you printed for him?

Ans. Yes; the streamers.

409. Q. Anything else?

663 Ans. I could not tell you; I have no knowledge in my head of what I printed in these three years; there are only a very kinds here I see.

410. Q. I have asked you about how the direction for the liniment compared in cost per thousand with the Universal Pills. I will now ask you how the directions for the cordial compare with the directions of the Universal Pills as to size?

Ans. About the same.

411. Q. Is that the direction for the cordial? (Handing papers.)

Ans. Yes, sir.

412. Q. They are about the same in size; how would they be in cost?

Ans. About the same.

413. Q. Do you know the number that you printed of each?

Ans. No.

414. Q. You have said that a part of the balance after the $4,000.00 for directions—a part of it was for labels; what portion of it was for labels?

664 Ans. I have not made up that. I have got here what you asked me, that you wanted, excepting such as bills of lading, letter-heads, and bill-heads.

415. Q. Are they included in this balance?

Ans. Yes, sir.

416. Q. How much of this balance is for these items?

Ans. $256.10.

417. Q. For letter-heads, bill-heads?

Ans. Dray-receipts, letter-heads, bill-heads.

418. Q. Can you give us any idea as to what amount was paid you for labels?

Ans. I hardly think I could.

419. Q. For what was the balance of this sum paid you?

Ans. All in printing I done for D'r McLean; envelopes, streamers, circulars, and other receipts, shipping-tags, business-cards, show——

420. Q. How much of it was for envelopes?

Ans. That I have not made up.

421. Q. Can you do that?

Ans. I have no itemized statement of these expenses.

422. Have you now stated all the results you obtained from your books?

Ans. Yes, sir.

Cross-examination:

665 1. X Q. (By Mr. Reber.) I understood you to say that D'r McLean paid you $3.00 a thousand for press-work alone on almanacs?

Ans. Yes, sir.

8. X Q. And that you furnished a small portion of the paper for almanacs, and D'r McLean furnished the body of the paper for almanacs?

Ans. Yes, sir.

9. X Q. In regard to circulars, how much did you say D'r McLean paid you for circulars and papers?

Ans. You refer to directions, I guess.

10. X Q. Yes, sir; printed directions.

Ans. I stated prices.

11. X Q. You gave some amount.

Ans. $4,785.00.

12. X Q. For what?

Ans. Directions.

13. X Q. Did you furnish all the paper on which the directions were printed?

Ans. No; I don't believe I did.

14. X Q. I understood you on a certain sort of paper you could print 3,500 directions; that is the utmost amount that could be printed on such paper?

Ans. Yes, sir.

666 15. X Q. Practically would there be any loss; and, if so, how much, in using that paper for printing purposes?

Ans. I gave that number; I think I have allowed a little for loss.

16. X Q. So there would be a net?

Ans. That would be the net proceeds.

17. X Q. How many of the printed directions would it be possible to print on a ream if you could use every part of the paper?

Ans. It would be 3,800.

18. X Q. The paper which you furnished for printing the directions, or whenever paper was not furnished you for that purpose you are directed by D'r McLean to purchase, and you picked it up in such lots as you could?

Ans. Yes, sir; I always acted for the benefit of D'r McLean.

19. X Q. Sometimes of one quality and sometimes another?

Ans. Yes, sir.

20. X Q. Here are two papers, one marked "Exhibit X," and the other "K," in red ink; they are printed directions (handing papers to

Ans. Furnished by me?

397. Q. I mean between that and that amount, $37,000, for almanacs; what was the difference for?

What difference?

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Ans. You refer to directions, I guess.

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Ans. I stated prices.

11. X Q. You gave some amount.

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Ans. Yes, sir; I always acted for the benefit of D'r McLean.

19. X Q. Sometimes of one quality and sometimes another?

Ans. Yes, sir.

20. X Q. Here are two papers, one marked "Exhibit X," and the other "K," in red ink; they are printed directions (handing papers to

witness). Look at these and say whether an equal number of
667 those could be printed on the same sized sheet of paper?

Ans. Yes, sir.

21. X Q. Suppose the paper to be 28 x 42, could an equal number of the printed directions be printed on the same sheet?

Ans. Yes, sir; there would be a larger margin on one than the other. It always turns off eight on a sheet. There would be a little fall off on one and not on the other.

22. X Q. On smaller-sized printed directions there would be more waste on a sheet?

Ans. Yes.

23. X Q. The cost would be the same?

Ans. Yes, sir.

Re examination:

423. Q. (By M'r Deneson.) Suppose you had a smaller-sized sheet so you could cut less out without waste, would not the cost of these by the thousand be less than the cost of these?

Ans. By getting a special size of paper made to order which was not in the market, and I did not find it profitable to order a special size just for that kind.

668 424. Q. Did not D'r McLean buy a great deal of his paper from the mills?

Ans. He bought most of his paper from the mills, but not for the directions.

425. Q. Where did you buy when you bought for him?

Ans. Different places, different mills, different stores and commission-merchants, paper-brokers.

426. Q. If you were buying for these directions would not you buy paper of such size as to cut without waste?

Ans. Yes, sir; if I was using only that size I would. In my explanation the other day you will find the reason for it.

At this point the further hearing of the case was adjourned until eleven o'clock, Aug. 1st, 1874.

AUGUST 1ST, 1874.

The parties met and the hearing of the case was resumed as follows:

669 MARCUS S. HOLMES, being duly sworn as a witness on the part of the complainant, testified as follows:

1. Q. (By M'r Gray.) In what business are you?

Ans. Paper.

2. Q. In S't Louis?

Ans. Yes, sir; 103 North Second street.

3. Q. And for how long?

Ans. I came here in 1861.

4. Q. And have been in that business from that time?

Ans. Yes, sir.

5. Q. What is the name of your firm?

Ans. Snyder & Holmes.

6. Q. How long has that firm existed?

Ans. About four years and a half.

7. Q. Has your firm sold paper to D'r McLean?

Ans. Louis Snyder and Sons, of Hamilton, Ohio, have; and we have also here.

8. Q. Were the sales from the mill in Ohio through your house?

Ans. No, sir.

9. Q. What kind of paper has your house sold?

Ans. Book-paper, manilla paper, and some colored paper.

10. Q. Look at printed directions, marked "K 1" in red ink, and
670 state whether your house has sold D'r McLean paper of that kind and quality?

Ans. Yes, sir.

11. Q. At what times?

Ans. I can't give you the exact dates.

12. Q. Did you during 1870, 1871 and 1872?

Ans. Yes, sir; I think we have been selling him off and on most every month, more or less, just as his wants happened to require.

13. Q. State at what price paper of that quality and kind was sold to him?

A. That I could not do. What times?

14. Q. I say from November 9th, 1870, to May 21, 1872.

Ans. I could not give you the figures without going to the books. The market has changed very much since that.

15. Q. By looking at your books you could ascertain the price?

Ans. We could get at the market price of paper of that quality about that date.

16. Q. Do you know anything about printing?

Ans. I have no practical knowledge.

17. Q. Are there different sized sheets of that paper of that quality and description?

671 Ans. Any size required or any weight.

18. Q. Was there such a size as 28 x 42?

Ans. Yes, sir; that is the regular size, one of the regular sizes.

19. Q. What are the other sizes?

Ans. They run from 22 x 32 to 28 x 42, varying an inch to two inches according to the scale up; that is about the usual grade of the scale; then there are other sizes made outside of that of any size required.

20. Q. By examining your books you could ascertain the price of the different sizes of such paper from the 9th of November, 1870, to May 1, 1872?

Ans. Yes, sir; at that time I could give you the market price of paper.

21. Q. Look at Exhibit X and state whether from the 9th of November, 1870, to May 21st, 1872, you sold paper of that quality to D'r McLean?

Ans. There is not really much difference between the quality of these two papers.

22. Q. Do you know whether you sold that kind?

Ans. I could not state whether we did or did not here.

672 23. Q. Look at Exhibit Y, Volcanic Oil Liniment directions (handing paper to witness).

Ans. This I should think was a better quality of stock than the other —better paper.

24. Q. Did you sell that kind to D'r McLean between those dates I have named?

Ans. I could not tell you here.

25. Q. By looking at your books you could?

Ans. Yes, sir; are you speaking now of the paper from the house or mills?

26. Q. Of course I am asking as to what you know that you have

sold; if you know the paper was furnished from the mill, that is all the same; at what price and the kind?

Ans. Well, the paper that is sold to D'r McLean from the mills go to him direct, and the price is made with the mills, and don't pass through the house here, and I know but very little of it, and I would not be competent to testify from the stock going from the mills.

27. Q. Do you know, where it was furnished from the mills, what the paper was worth at the mills, what they sell it at?

673 Ans. I know about what that stock of paper would be worth.

28. Q. In your examination could you get that also?

Ans. I could I suppose by getting the figures from there; that would be the only way.

29. Q. You buy from the mills?

Ans. Yes; we get all our supplies from there.

30. Q. The same quality and same single kind of paper?

Ans. They make a special paper, I believe, for the doctor.

31. Q. Do you know what kind is the special kind they make?

Ans. I have seen it.

32. Q. Do you know the price at the mills?

Ans. I don't know the price they furnish all at; you are speaking now of the paper at these dates?

33. Q. Yes, sir; between those periods at any rate, as far as your house has sold, you can fix the price?

Ans. Yes, sir; I can tell you all about. For instance; this paper, we may sell the doctor same paper corresponding to this from the

674 house, and give you figures on that in this way. There are two or three different grades of news, and four or five of book, and it is a difficult matter to tell by taking a sheet and comparing, to tell what the particular value at any particular time might be.

34. Q. You mean the exact value?

Ans. Yes.

35. Q. You can tell about?

Ans. Yes, sir; we can give the approximate value.

36. Q. Reasonably near?

Ans. Yes, sir.

37. Q. Do you know whether D'r McLean had any special arrangement or contract with the mills, as to the price they were to furnish him the paper at; if you know from D'r McLean or any way in connection with the business?

Ans. My information would come from the parties at the mill, whatever information I had.

38. Q. My question is whether D'r McLean had any special arrangement with the mill for paper, and prices at which it was to be furnished to him by the mills.

(Counsel for defendant objected to the question unless the wit-

675 ness speaks of his own knowledge or coming from D'r McLean.)

Ans. From my own knowledge I will have to answer, no.

39. Q. Have you any information from D'r McLean as to the price he obtained *at it*?

Ans. I have not, at these dates.

40. Q. Look at Exhibits E 1, E 2, & E 3, which are almanacs, and state whether in 1870, 1871, and 1872, you or your house sold D'r McLean paper of that quality and description, and in those almanacs?

Ans. The house did not sell it.

41. Q. Do you know the price of such paper in 1870, 1871, and 1872?

Ans. I could not give it to you from memory.

42. Q. The wholesale price?

Ans. I could not here.

43. Q. Do you know whether that paper was furnished or manufactured by the mills you speak of in Ohio?

Ans. This was 1870, 1871, and 1872; the mills furnished the doctor in those years I am quite positive.

676 44. Q. Do you know whether that paper in those almanacs was a part of the paper that came from those mills?

Ans. That would be a thing that no man could tell the probabilities are.

45. Q. I did not know but the dealer could tell. Did you deal in paper of that quality?

Ans. Yes, sir, we were selling about that grade of paper all the time.

46. Q. Were you in 1870, 1871, and 1872?

Ans. Yes, sir.

47. Q. Do you know whether D'r McLean used that kind of paper largely or not during those years?

Ans. He did.

48. Q. Would he be considered a wholesale dealer? In purchasing, would he buy as a wholesale purchaser?

Ans. Yes, sir.

49. Q. You dealt in the same kind of paper yourself?

Ans. Yes, sir.

50. Q. Can you state the wholesale price of that quality of paper?

Ans. Not at that time without referring to my books.

51. Q. Could you by referring?

677 Ans. Yes, about that grade of stock.

52. Q. Look at Exhibit D 1, D 2, D 3, D 4, and state whether you sold paper of that description to D'r McLean in 1870, 1871, and 1872.

Ans. They are a grade of paper we are selling more or less all the time, and paper he uses more or less all the time, and we probably sold it to him.

53. Q. Can you tell the prices?

Ans. No, sir.

54. Q. Can you by looking at your books?

Ans. Yes, sir; tell the prices about that time. There have been so many changes in the market since those dates.

55. Q. Will you look at Exhibit K, which is label K, and state whether you have sold D'r McLean, in 1870, 1871, and 1872, paper of that description?

Ans. I would come under about the same class stock as the other. I should think we did.

56. Q. By examining your books you could ascertain the price you sold it to him at?

Ans. Yes.

678 57. Q. Do you know whether he bought paper of that particular description from the mills during those years?

Ans. No, I do not.

58. Q. You can ascertain the wholesale price of that article of paper as purchased from the mills?

Ans. Yes, sir.

59. Q. You spoke of colored paper, as having furnished colored paper?

Ans. This wrapper here is something the character of it, what we call a cover-paper.

(The paper referred to by the witness was a liniment cover, and was marked "Exhibit Y.")

60. Q. Did you sell D'r McLean paper of that description between those dates?

Ans. I think we have, sir.

61. Q. And by examining your books can you ascertain the price at which you sold it?

Ans. Yes, sir.

62. Q. Look at that and state whether that is the same or different quality from those you have looked at before? (Handing witness a cordial cover marked "Exhibit X 2.")

679 Ans. That I should say was a little better stock than most of the other.

63. Q. How does it compare with that?

Ans. I should think the quality was about the same. This is the stoutest.

64. Q. You mean the label, and that is the same?

Ans. Yes, sir; as regards the quality of material out of which they are made.

R. P. STUDLEY, being duly sworn as a witness on the part of the plaintiff, testified as follows:

1. Q. (By M'r Gray.) What is your business?

Ans. Stationer, printer, & lithographer.

2. Q. In S't Louis?

Ans. Yes, sir; 221 Main street.

3. Q. How long have you been in that business here?

Ans. Some twenty-two or twenty-three years.

4. Q. State whether you are acquainted with the prices for printing & lithographing in S't Louis, say from the beginning of the year 1870 to the present time?

680 Ans. I am acquainted with the price charged by myself, not particularly acquainted with the price charged by any other lithographers.

5. Q. Do you know what the general rates are in the city?

Ans. Well, they can't vary very much from my own. I presume they do vary some. It is natural; no more than any variation in *in* competition in business would be.

6. Q. Look at Exhibit K 2, a label which is a duplicate of Exhibit K 1, and state what you would print this label for by the thousand, furnishing the paper and doing the work.

Ans. In what quantities?

7. Q. The quantities furnished during a period of a year and a half, from time to time, where you print them at your own convenience, beginning with November, 1870, 100,000?

Ans. In lots of 100,000 I should furnish them at one dollar per thousand.

8. Q. That covering what?

Ans. The total expense.

9. Q. Suppose you had a contract for doing it from year to year,

681 amounting to, say, 200,000 during that time?

Ans. That would be the rate; it is the rate I have charged for similar work.

10. Q. What would you include in that?

Ans. Paper and printing; all expense.

11. Q. Can you tell us how many of that description of label you could get out of a sheet? Does that include the expense of lithographing?

Ans. Yes, sir; that is all there is of it, lithographing and paper.

12. Q. Suppose the stone was furnished you, and you did the printing and furnished the paper?

Ans. It would be all the same. I think you get fifty-six out of a sheet; I can't tell for a certainty, I cannot tell how much they lap. Allowing an inch for the lap, fifty-six from a sheet 28 x 42. I don't state that as an exact certainty.

13. Q. Suppose the paper was furnished to you by the party desiring the labels, what would you do the work for?

Ans. I think the paper would cost perhaps thirty-five cents a thousand, leaving sixty-five a thousand for lithographing.

682 Cross-examination:

1. X Q. (By M'r Reber.) The price you speak of getting up these labels for you confine yourself from 1870 to 1872?

Ans. I have not made any change in my price for the last five years in that.

2. X Q. Then you speak of the price from 1870 to 1872?

Ans. Yes, sir.

3. X Q. What sort of a press do you use, a power-press or a hand-press?

Ans. Both, mostly power-presses, steam.

4. X Q. Is there any difference in the cost of printing, whether you use a power-press or a hand-press?

Ans. Yes, sir.

5. X Q. Parties who use hand-presses could not do work as cheap as you could who use the other press?

Ans. No, sir; the cost to me would be less than to a person who run his off hand presses. The presses coming in competition, the man running a power-press or steam-press would win.

6. X Q. From 1870 to 1872, were power-presses in general use?

Ans. Yes, I had them in use, and all the larger offices in the country had them in use.

683 7. X Q. Not in smaller offices?

Ans. No.

8. X Q. What would be the difference in the cost of getting up the label, whether printed on power-presses or hand-presses?

Ans. I can't say, not fully. If you will allow me to say on what I have, this thing that I am doing now—I am printing lots of 100,000 of an article almost identically the same, in general style and paper, for $100.00 a 100,000. That same job was formerly done by McLean on a hand-press at the same price.

9. X Q. You mean to say there is no difference?

Ans. I mean to say there is a difference in actual cost, but I make the larger profit. The profit would be double to me than what it was to the other one. The price I give is what I charge for actual work delivered, not the exact cost to me.

10. X Q. It would cost 100 per cent. more to run it on the hand-press?

Ans. Yes; the paper makes no additional charge.

684 11. X Q. As to what number of labels can be printed on a sheet of a given size you only spoke approximately?

Ans. I think, actually, fifty-six on a sheet 28 x 42. I don't think it can vary more than six from that.

Re-examination:

14. Q. (By M'r Gray.) Suppose the man wishing to use the label owned the lithograph himself?

Ans. You mean the engraving?

15. Q. If that is the proper term, the original engraving, the stone from which it is struck, would the cost to him be as much as you have stated?

Ans. 1.00 a thousand?

16. Q. Yes, sir.

Ans. I should charge the same whether he furnished the same or not.

17. Q. Suppose D'r McLean, wanting to use these labels, owns the stone, and works them in his own establishment, how would the cost to him compare with the price you have stated you would print them for?

Ans. I have stated my charge would be the same, though the cost to me would be less. I would charge him the same as working a
685 hand-press. I can give you about the cost to D'r McLean, if working a hand-press.

18. Q. Well?

Ans. Well, I should say the actual cost to the doctor, if he did his own work on a hand-press, would be about $1.00 a thousand.

19. Q. Then you would make it the same as you would charge?

Ans. If he works a half sheet, 28 x 42, it would give him 28 labels, and that for 100 impressions would give him 2,800; the cost of press-work and ink and paper, I estimate, would be $2.80.

20. Q. For what?

Ans. 2,800 labels, he pays his journeyman $1.50 for that size sheet, fifty cents; for expense of ink and expense of doing business, and eighty cents for paper, making $2.80. I don't think it would vary much from that; $2.80 for 2,800.

21. Q. How do you print lithographs like Exhibit K; on a power-press or hand-press?

Ans. On a power-press on a half sheet of 42 x 28 or 25 x 38.

686 22. Q. Are those printed by a hand-press any better than those printed on a power-press?

Ans. No; not as well, as a general thing.

At this point the further hearing of the cause was adjourned until two o'clock September 21st, 1874.

S'T LOUIS, *Sept. 25th*, 1874.

Met pursuant to adjournment; present as before.

MARCUS S. HOLMES recalled.

Q. (By M'r Gray.) When you were on the stand before I asked you to look at this paper, marked K, the one in red ink, and the question you were asked was whether you had sold D'r McLean paper of that kind and quality at any time between November, 1870, or after November, 1870?

A. Well, I have taken our books through from February, 1871, to the present day. That is as far back as our concern goes, that is, the present concern, and I found that sales to D'r McLean consist of what we call No. 1 book and No. 2 book, & "No. 1" and "No. 2" sized-calendar book; there are four different qualities there.

687 (Judge Reber, counsel for defendant, desired the witness to

confine his testimony to his own personal knowledge, not what he learned from the books.)

Q. Did you sell any paper like this to him? (Exhibit K shown to witness.)

A. Then I will have to answer by saying no.

The MASTER. You can testify of what you know of your own affairs.

Q. My question is, whether you sold paper like that to D'r McLean at any time after November, 1870?

A. Would that personal knowledge consist of whether I had sold that paper myself, or some person in the house?

Q. Do you know the price of such paper at any of those dates in S't Louis? In the first place I would like to have you answer whether you or your house ever sold paper of that description to D'r McLean?

A. At any time in those dates?

Q. Yes; after November, 1870.

A. Yes, I should say we had.

Q. At what prices or price?

A. I find an entry in June.

688 (Counsel for defendant objected to the witness speaking from the book unless he has personal knowledge.)

WITNESS. Then I don't see how I am to do it, because men are bel*ay* and I am in the office; I make no sales. It is very seldom that I make a sale.

The MASTER. Do you not know in regard to the prices?

A. I know about the price of paper and the discharges, the way it is made, what quality of paper it is, and I know what price the parties that bought it paid for it; for instance, by having on the book No. 2 paper charged such a date, at such a price, I know from the quality what the party paid for it.

M'r. REBER. Do you know what D'r McLean paid for it?

Ans. His bills are all receipted.

M'r GRAY. Now state the prices, date, and year.

(M'r Reber renewed his objections.)

The MASTER. You can test the source of his knowledge on cross-examination, as to his knowledge of his own business, and the price it was sold.

Q. My question is, and you have answered that you and your

689 house sold paper of that description to D'r McLean at a certain date, at what price was it sold?

A. In June, 1872, we sold an article, about as I would call that Exhibit K, at 15½ cents, as near as I can judge, like that.

Q. What do you mean by 15½ cents?

A. 15½ cents per pound.

Q. How many pounds of that description in a ream?

A. It varies all the way, just according to way the party wants it; we have several different sizes and weights.

Q. Say 28 by 42.

A. Well, it might be 50, 60, or 70 pounds to the ream, or even 40.

Q. You mean that kind of paper, such as that is. Of course there are different qualities of that; the weight determines the quality, does'nt it?

A. No, sir; we make of any quality, any weight, or size the party wants.

Q. Take paper of that description, how many pounds are there in a ream of that quality of paper—of that kind?

A. As I stated before it depends on what the party requires; we run perhaps four or five different sizes and weights.

690 Q. I am speaking of the size of 28 x 42.

A. Well, I should say that would weigh fifty pound, paper 28 x 42, if I get your idea of what you desire to get at.

Q. That is what I mean, paper of that description sold at 15½ cents.

A. At that time, yes. The weight and size had nothing to do with the price of it at all.

Q. Just the quality?

A. The quality governs the thing entirely, irrespective of the weight or size.

Q. What were the other sizes beside 28 by 42?

A. They run 24 x 36, and 25 x 38, and 28 x 42 regularly, and would make anything else a party may desire.

Q. Do you know the size of the paper that you sold to D'r McLean, at this date, at 15½ cents.

A. My recollection is that it was 25 x 38, 40 pounds, to the best of my recollection.

Q. Did you make any other sale of such paper as that after November, 1870?

A. No, sir; I find no other entries at all, except that one particular time.

691 Q. Do you know the market-price of that paper in S't Louis, from November, 1870, up to 1872, or afterwards?

A. I don't know that I could give it to you here, sir.

Q. Do you know whether it varies?

A. Yes, sir; it did vary.

Q. Little or much?

A. Well, there has been a decline and advance, since that time, both.

Q. Since what time?

A. That was in June, 1872.

Q. Did you make any sales prior to that one of June, 1872?

A. Not of that quality of stock that I see. There is no entry previous to that date.

Q. The size you speak of I think you stated was——

A. 25 × 38 and 40 pounds, if my recollection is right, and I believe it is; that is 40 lbs. to the ream.

Q. Look at Exhibit X, and state whether, after November, 1870, you or your house sold paper of that description to D'r McLean?

A. Well, there is very little difference between the quality of these two papers?

692 Q. Do you know whether there is any difference in the price?

A. I should think the probabilities are that they might have been sold for the same thing.

Q. Do you know whether you sold any of that description (Exhibit X)?

A. No, sir; I cannot tell.

Q. Look at this paper marked "Exhibit Y."

A. Well, that would come under about the same quality of stock.

Q. The same as the first Exhibit K No. 1?

A. Yes, sir.

Q. As to the price?

A. About the same thing.

Q. The same price and the same sizes?

A. Yes, sir.

Q. Does the price vary with the sizes?

A. Not at all; has nothing to do with it at all. The quality of stock makes the price entirely.

Q. When a sheet of 28 × 42 of the same quality and style is the same price as one 24 by 36 or 25 by 38?

A. Yes, sir; the same price per pound.

Q. But the one of larger size, a ream of larger size of the same quality, would naturally weigh more?

A. Yes, sir.

Q. So that a larger size would cost more on account of the added weight?

693 A. Yes, sir.

Q. Are such papers always bought and sold by weight?

A. Well, generally.

Q. Look at Exhibit Y No. 2, and state whether, after November, 1870, you or your house sold paper of that kind.

A. No, sir; I find no charge of the article on the books.

Q. Do you know what such paper was worth in this market after November, 1870, or 1871, or 1872, from your own knowledge?

A. I might give an approximate estimate, but not exactly.

Q. Did you deal in that kind of paper?

A. Yes, sir; we dealt in that kind of paper at that time.

Q. Can you state the rates at which the paper was sold?

A. Yes, sir.

Q. State the price, as near as you can, per ream.

A. At what particular time?

A. In November or December, 1870.

A. I cannot go back of 1871; that is not here.

694 Q. Can you give 1871 from February through the remainder of 1871?

A. I don't think I would hazard an opinion on that without referring to the figures to get at it.

Q. Did you not look to inform yourself?

A. I did not on the quality, because I looked merely on the goods that we sold to the Doctor. I took his entries right from the books. I found the charges which we were selling goods to him. That is all I paid attention to. I did not give any research for any other goods at all.

Q. Look at the label, or paper constituting the label of Exhibit K No. 2, and state whether you or your house sold paper of that description to D'r McLean during the year 1871 or 1872.

A. In May, 1872, I find an article which I think matches that at 20½ cents.

Q. Per pound, you mean?

A. Yes, sir.

Q. Do you know the sized sheet?

A. I think it was 25 × 38, fifty pound per ream. It is a pretty hard matter to recollect that far back.

695 Q. Take Exhibit K, No. 2, and state how that quality of paper compares with Exhibit Y 2.

A. Well, they are a totally different thing.

Q. Is there a difference in the cost of them?

A. Yes, sir.

Q. Which cost the most?

A. This paper, Y 2, would probably be the most expensive.

Q. What is the difference of the cost, can you tell; that is, during the year 1871?

A. Probably as fair an estimate would be to give the present differ-

ence in the value of the goods; that would be about an average, I suppose.

Q. Would the prices be the same now as then?

A. They run about the same, average about the same as 1871 and 1872, vary about the same.

Q. Well, then, just state the difference.

A. There is about one cent per pound difference in the two.

Q. Look at these almanacs, marked "Exhibit E, 1, 2, & 3," and state whether you or your house sold paper of that description to D'r McLean in 1871 and 1872?

A. I did not find any entries to cover that stock at all.

696 Q. Do you know what such paper was worth in the market in those years, 1871 and 1872?

A. I cannot tell.

Q. Did you deal in that kind of paper?

A. We did not at that time.

Q. Look at these Exhibits marked D 3, D 4, D 2, and D 1. Did you sell D'r McLean paper of any one of those descriptions?

A. No, sir.

Q. Do you know the market-price of any of these papers in S't Louis in 1871 or 1872?

A. No, I don't; when I come right down to the plain answer to the question.

Q. Did you deal in that kind of paper?

A. No, we did not; that is what is called sort of "No. 2, news," and we didn't deal in it in those years; we dealt only in the "No. 1" article.

Q. You know about the price, don't you?

A. It would be all guess-work with me to give you the price of it as long ago as that.

Q. What do you mean by No. 2?

A. I mean an inferior grade of a pure all-white paper.

Q. Do you mean to say these are of that description, an inferior grade?

697 A. I should say they were a mixture, as near as I am able to judge from these samples.

Q. Look at Exhibit K, the one shown you before, and state whether you sold any of that description to D'r McLean in 1871 or 1872?

A. That is the same goods, I believe, as the other.

Q. As Exhibit 2?

A. Yes; the same quality of stock, I should think.

Q. What do you say was the price?

A. I think 20½ cents was the price I gave you.

Q. Per pound?

Ans. Yes, sir.

Q. And Exhibit K, you say, was about the same quality and price?

A. Yes, I should judge they were. It is a pretty difficult matter to judge of a price of paper, the quality of the small piece like that.

Q. What is the quality of that paper?

A. It is what we call "sized" and "calandar book."

Q. Is it the first quality of paper?

A. Yes, sir.

698 Q. Did you state, in looking at Y 2 before, that you thought you had sold paper of that description?

A. I was under that impression, that we had some, but came to examine the books I find no such charge made from 1871 to the present date.

Q. Look at Exhibit X 2, and state whether you sold that description to D'r McLean at any time in 1871 or 1872.

A. Yes, sir.

Q. What time did you sell it?

A. I find the first entry for that in July, 1872.

Q. At what price?

A. 18½ cents.

Q. What sized sheets?

A. I think that is 25 by 38.

Q. And the paper to the ream, can you tell?

A. I should think that is about 50-pound paper, sir.

Q. Is that date the first time you sold paper of that description?

A. That is the first entry I find.

Q. Do you know the price of that paper in 1871?

A. No, sir; I cannot give you the figures here.

699 Q. In 1872, April say, or January and February, through April or May?

A. I have nothing to show me prior to that date.

Q. What kind of a purchaser was D'r McLean, small or large purchaser?

A. He is considered a large buyer.

Q. Did he buy at wholesale prices?

A. Yes, sir.

Q. Do you know how the prices at which you sold to him compared with the prices at which the same quality of paper could be bought at the mills?

A. No, sir, I don't. I don't know that I understand your question. (Last question repeated.)

A. Well, our prices would be somewhat higher here, but not a great deal.

Q. If D'r McLean bought at the mills could he buy as low as you sold to him when you sold to him here?

A. Yes, sir.

Q. Could he buy lower?

A. There might be a difference of freight, and a smaller commission, possibly.

700 Q. I don't know whether that answered my question. My question was whether he could buy lower at the mills than of you the same kind of paper?

A. I would have to answer that question, yes, I suppose. I' depends altogether how the Doctor would buy it, there are so many points in the case that would come in.

Q. Suppose he bought the same quantity?

A. Whether he bought paper at the mills or delivered here, then there would be little difference in the price; if he bought the paper and paid the freight there would be very little difference.

Q. Do you mean to say that he could buy either of you or at the mills at about the same price?

A. There would not be much difference.

Cross-examination by defendant's counsel:

Q. (By M'r Reber.) In the prices of the various paper that have been submitted to you, they fluctuated, did they not, from time to time, sometimes higher and sometimes lower?

A. Yes, sir; changed all the time, especially in the last two or three years, or three or four years.

701 Q. When you looked at these exhibits which have been shown you, these samples of paper as found in exhibits, and compared them with the paper that you sold D'r McLean, you think they were the same?

A. I should think they were the same quality of stock, made from the same quality of stock.

Q. You are not certain about that, are you?

A. I cannot swear positively on that. It is a pretty difficult matter to judge of a piece of paper like that; one of the nicest things in most any business to do it without having the samples side by side.

Q. You have been in the business some time?

A. About twelve or fifteen years.

Re-examination by M'r Gray:

Q. You say the prices fluctuated; which was the extent of the fluctuation; how much?

A. I will have to get the figures for that.

Q. Well, you can give us some idea whether they doubled.

702 A. No, sir; probably the decline has been varied since 1871 from 10 to 15 per cent., sometimes it has declined, and then there has been a reaction and it has advanced again, and then it has declined, working back and forth in that way; but taking it on the whole there has been a gradual decline since that up to the present day.

Q. Since what date do you speak of?

A. February, 1871?

Q. The range of decline you set at how much, what per cent.?

A. About 15 to 20 per cent., the majority of it though has been probably in the last twelve months or later.

Q. How do you mean, the greater portion of the decline?

A. Yes, sir; we had one drop last week of about 10 %.

Q. You came here in February, 1871?

A. No, sir; I came here in 1861, and went into this business with M'r Snider in February, 1871.

H. C. DRIGGS, recalled by plaintiff.

Q. (By M'r Reber.) Since you last testified, have you made a thorough examination of the books of D'r McLean as requested?

A. I have somewhat; I have not finished them as requested.

Q. How long will it take you?

A. Not a good while.

M'r REBER (to M'r Denison). What examination did you require?

M'r DENISON. Covering the time between the 21st of May, 1872, down to the time of the decree.

The MASTER. You have a right to show in regard to the sales down to the time of the decree.

M'r DENISON. We asked that the accountant have facilities for furnishing that account as called for, and bringing that account down as far as the same relates to the sales of the Universal Pills down to the date of the decree.

The master granted the request.

JOHN G. TAYLOR sworn and examined.

By M'r Denison:

What is your business?

Ans. Bookkeeper.

704 Q. For whom?
Ans. D'r McLean.
Q. The defendant?
Ans. Yes, sir.
Q. You have entire charge of his books?
Ans. Yes, sir.
Q. How long have you had charge of them?
Ans. About 13 years.
Q. Do any of his books contain entries of all the Universal Pills which have gone out of his establishment since the 9th November, 1870?
(Counsel for defendant objected to the question on the ground that the books are the best evidence.
The master overruled the objection.)
Ans. It is a difficult question to answer to make it explainable. If you will allow me to qualify it, I will do so.
Q. Very well, explain it.
Ans. While the books were under my control, when we exchanged pills there was no entry made of them, consequently a great number of pills went out under those considerations to be exchanged for others that were for some cause or other returned; that I can't explain.
705 I don't know anything about that, because it was done through the travelers and it was not referred particularly to me. I had simply charge of the books of the accounts proper that were sent out; I charged as actual sales the commissions of cash sales.
Q. Do you say, then, that pills did go out from D'r McLean's establishment of which no entry was made on the books?
Ans. Yes, sir.
Q. What entry or memorandum, if any, was made of any pills that were sent out?
Ans. There was a memoranda on slips; it was done thro' orders of the travelers, & when the travelers left the slips they were generally destroyed, after a satisfactory settlement with the travelers.
Q. Were entries made on the books of all the pills which went out of the establishment except such as were sent out for the purpose of exchanging for new wrappers?
Ans. I don't know; I cannot say whether there were any pills that went out under orders by the travelers that were for other parties;
706 I cannot say; I don't believe there was; all I say is the pills that went out that were sold, for cash on commission, were entered, & I am not aware of any others going out.
Q. In what books were they entered?
A. I really cannot remember.
Q. Which books do you mean?
Ans. All entries that were made entries were made in the day-book first & then entered in the journal.
Q. What other books, if any, contained entries of pills that went out of the establishment?
Ans. I don't know of any other particular books; the travelers had little books of their own—memorandums.
Q. Any entries in the cash-book?
Ans. Yes, sir.
Q. What other books?
Ans. In the ledger.
Q. What other books?
Ans. That is all. There may be some in the journal.
Q. Do those entries in all cases name the pills?

(Counsel for defendant objected to the question as tending to prove the contents of the books.)

707 M'r GRAY. We want to show whether the books contained all the transactions.

(The master overruled the objection.)

Ans. There was no particular; the entries were not itemized; it was simply so much returned from the gross proceeds of the different preparations.

(Last question repeated.)

Ans. Which entries do you refer to?

Q. I refer to entries of pills that went out of the establishment in any manner or for any purpose. I refer to all entries regarding them.

Ans. The cash received was not specified whether it was for pills or for other preparations.

Q. Does any other book mention it?

Ans. No, sir.

Q. I didn't ask you about entries of cash received. I ask you where entries of pills that went out of that establishment were made, if at all, and whether such entries named the pills?

Ans. The pills that went out that were sold for cash or commission, were entered in the order-book. The pills that went out for other purposes, for instance exchanges, or to make up for loss in other
708 ways, were not entered, except temporarily on temporary slips of paper.

Ans. Did the entries that were made in any of the books name the pills?

Ans. Named the pills in all cases under those circumstances.

Q. What do you mean by under those circumstances?

Ans. Under the circumstances in the preceeding answer.

Q. Do I understand you to say that pills that were delivered to the travelers were not entered on the books?

Ans. The pills that were delivered to the travelers?

Q. Yes.

Ans. I really don't know. I didn't keep tho travelers' account; I didn't keep any account except the cash and commission account.

Q. Who did keep the travelers' account?

Ans. The travelers' account at that time was kept by an assistant of mine.

Q. What time?

Ans. Up to the first of last January, I think it was.

Q. From what time?

Ans. I really don't remember.

709 Q. November 9th, 1870, were you keeping those accounts?

Ans. Yes, sir.

Q. How long did you continue to keep them?

Ans. I have keep the accounts up to this time, but I have had an assistant who kept the memorandums of the travelers.

Q. Under your direction?

Ans. Not exactly under my direction.

Q. Didn't you have charge of the books?

Ans. Yes, I had charge of the books proper; not the auxiliaries.

Q. How far back did this assistant do this work of keeping the travelers' books?

Ans. I don't remember how far it is back. It was done sometimes by the travelers themselves, who would have a man to assist in settling

their accounts. They had their own memorandums, & settled up by whoever was assisting in the office at the time.

Q. Don't these entries in some manner appear on your own books?

Ans. No, sir; not on the books I had charge of.

Q. In what way from your books or other memoranda belonging to D'r McLean will it show the account of the Universal Pills? In

710 what way from your books or other memoranda belong' to D'r McLean will it appear what amount of the Universal Pills have gone out of D'r McLean's establishment since November 9th, 1876?

Ans. The record book will show the amount of pills turned out by the travelers.

Q. Who keeps that record book?

Ans. It is kept by—I looked over it myself and it was kept by an assistant.

Q. In D'r McLean's place of business?

Ans. Yes, sir.

Q. How far back have you those books?

Ans. We have them back I presume as far as 1863 or 1864 or '65 or something like that: I forget.

Q. What is the name of that book? What do you call it?

Ans. Call it a record book—Travelers' Record Book.

Q. Then all the bills that went out of D'r McLean's establishment on sale or commission or on delivery to travelers, will appear by name in the several books which you have mentioned?

Ans. I presume so.

711 Q. Do any other books contain such entries?

Ans. I think they are all contained in that large book; the record-book of the traveler's book of the entire business that they did.

Q. Will that book, or any book or memoranda kept by D'r McLean, show what portion, if any, of those pills delivered to the travelers have been returned to D'r McLean?

Ans. No, sir: it will not.

Q. Do any of the books contain any entries showing payments received for pills delivered to the travellers?

Ans. Not for pills directly. It shows their gross receipts, that record-book. It shows the travellers' returns.

Q. Are all the pills which have been delivered to the travelers accounted for?

Ans. Yes, sir.

Q. Where does that appear on the books?

Ans. I would like to understand that question better.

Q. (Last question repeated.)

Ans. It does not appear on the books, that is—I should qualify

712 that answer: I mean to say, for instance, if the traveler reports that he has exchanged a dozen or two dozen pills as he goes along, why, it is taken in a verbal statement: his word is taken for it, & consequently it don't appear on the books.

Q. When he sells them how is the return made to appear on the books?

Ans. There is no return appearing, except the amount of money he remits and that is credited to general merchandise.

Q. Then no book kept by D'r McLean will show what portion of the pills delivered to the travelers have been sold?

Ans. No, sir: it is impossible.

Q. Nor whether any of them have been returned or not?

Ans. No, sir; no books will show it.

Q. But you say they are all accounted for under the head of merchandise?

Ans. No, sir; I do not.

Q. How are they accounted for?

Ans. They are accounted for—yes, yes. They are accounted for under the head of merchandise.

Q. I so understood you.

Ans. Yes; I suppose they were taken in the entire discount.

713 At this point the examination was adjourned until Monday, September 28th, at 2 o' p. m.

S'T LOUIS, *Sept. 28th*, 1874.

Parties met pursuant to adjournment.

D'r ROBERT DRAKE sworn and examined.

Examination by M'r Gray:

Q. You live in this city?

A. Yes, sir.

Q. How long have you lived here?

A. About four years and a half.

Q. In what business are you acting and in what have you been engaged?

A. In the proprietary-medicine business.

Q. In this city?

A. Yes, sir.

Q. What kind or class of medicines?

A. You mean the different articles?

Q. Whether you have been in the business of making pills?

A. Yes, sir; manufacturing D'r Harter's Liver Pills. That is one of our articles.

Q. You have been engaged in manufacturing those pills?

A. Yes, sir.

Q. With other proprietary medicines?

A. Yes.

714 Q. I will ask you how you put up those liver pills that you speak of?

A. We put them up in oval chip boxes, wrapped with a circular wrapper label, sealed with yellow paper to prevent them coming off, and then put in dozen paper cartoons holding a dozen boxes, and they are placed in wooden boxes holding 12, and sent to the trade in gross packages. That wooden box contains a gross of pill-boxes.

Q. Have you with you any specimen of the way you put them up?

A. Yes, sir; I have brought these to show the various stages of manufacture. Exhibit Z is the chip box; Exhibit Z 1 is the box sealed; Exhibit Z 2 is the box sealed and label; Exhibit Z 3 is the circular; Exhibit Z 4 is the box filled; Exhibit Z 5 is the box complete.

Q. Exhibit Z; how many pills does it contain?

A. Twenty-five pills to the box; supposed to contain twenty-five; of course often contains more.

Q. No' what else do you put on that box?

A. We put the circular, Z 2. We don't count that *is* general ad-

715 vertising expenses, still we know what that costs us; so much a gross.

Q. Look at that and state what that is.

A. That is the circular wrapped round the box, and then a yellow

paper is wrapped around it. Z 3 is the wrapped—the box closed, and the wrapper or label is put round the whole; this contains all four of these other packages—this wrapper here.

Q. State what is the expense of making these pills per box, including these different wrappers and labels.

A. You want the entire cost per gross?

Q. Starting with the materials; yes, sir.

A. I decline to answer what the material cost us.

Q. Leaving out the cost of the material, state what is the cost of making the pills put in the box Z.

A. You want a detailed statement?

Q. Yes; first making the pills.

A. It costs us for this just 12 cents a gross in that shape, Exhibit Z.

Q. You mean the pills including the box, simply the pills alone?

A. The labor now—the material, I have that under another item;
716 the labor now is what I am on. Filling them in the box—the labor is 33 cents for making the pills, for manufacturing the pills per gross; the labor of putting them in the box is 12 cents a gross.

Q. You mean to start first with the labor of making the pills?

A. Yes, sir; I should have stated it in that way, but I did not. Now, making the pills ready for the box is 33 cents a gross; putting them in the boxes is 12 cents a gross.

Q. Now what is the next step?

A. To put this yellow wrapper on; that costs us the same money—12 cents a gross.

Q. What next?

A. The label costs us the same. This is the label on.

Ques. The putting it on and the material and labor?

A. No; the labor of putting it on; there is no material included in this at all; that is the label on the lid. That puts it in that shape, Z 2.

Q. Is there any other item of labor?

A. The labor for wrapping is 33 cents a gross; wrapping with this printed paper, and that includes putting it into these box'—gross boxes or dozen boxes Z 5.

717 Q. Is there any other item of labor?

A. That is all, except the simple item of carrying down-stairs and packing into the gross box, which it is hard to estimate exactly what a gross would *would* cost, but I should count it 5 cents—putting the box of dozens into the gross boxes and in taking from one floor to the other. Now I am through the items of labor.

Q. Give us the cost for the box marked Z, without anything.

A. These cost us 25 cts a gross; that includes cost, carriage, a loss.

Q. What do you mean by carriage?

A. Freight.

Q. Loss—what do you mean by that?

A. Loss on boxes broken handling; I cannot come at that exactly. I make an estimate of what the loss is, but that is the way I arrive at the cost of it. I don't take an invoice of it. This yellow paper round it costs us one-half cent. per gross. That is Exhibit Z 1. These labels cost us 2½ cents per gross, labels on lid Z 2.

Q. The next thing is circular Z 2; state the cost of the circular per gross.

718 A. 15 cents per gross circulars cost us; the yellow wrapper costs us 7 cents a gross.

Q. These figures include material and printing?

A. Not the material, no, sir; when I speak of material I mean medicine.

Q. The paper, I mean the material, does that expense cover the cost of the paper and the printing?

A. Yes; that is the whole cost of it.

Q. That puts the small boxes in shape, ready for market, does it?

A. That goes into these boxes, gross boxes.

Q. The next step is to put the box Exhibit Z 4 into what?

A. Into Z 5.

Q. You have already explained the cost of putting it in?

A. Yes, sir.

Q. Now what is the cost of the box Z 5?

A. That cost us 30 cents gross; that is, I don't mean 30 cents a gross for these boxes, for gross pills; 12 of these boxes constitute a gross of pills.

Q. How much did you say the cost was?

A. For a gross of pills or enough to put up a gross of pills 30 cents; that labor there on box Z 5 is 7 cents a gross—the end label.

719 Q. Now, what are the boxes worth per gross?

A. Say 17 cents.

Q. Describe that box for the gross.

A. It is a planed wooden box, holding 12 of these packages.

Q. What time now are you speaking that this was the cost?

A. 1871 and 1872.

Q. In this city?

Ans. Yes, sir.

Q. Do you know how it was the last part of 1871? Were you here then in business?

A. Yes, sir.

Q. State whether there was any material difference in the cost of labor in the latter part of 1870.

A. It was about the same in 1870, 1871, and 1872.

Q. Has there been any change since 1872?

A. Yes, sir.

Q. Has it increased or diminished?

A. Diminished, the cost of preparing the goods; that is, probably owing to various causes, we are able to produce more pills, and are able to get more work than we were then.

Q. The cost has not increased?

720 A. No, sir. If there has been any change it has been on the decrease.

Q. Look at Exhibit K, box 2, and state how it compares with box Z.

A. That box K 2 costs more money than ours. It is a larger box.

Q. Do you know what such boxes cost during the time you mentioned?

A. Well, I don't know what it cost, but, judging from the price of ours, it would cost about 27 cents; that is, as I said before, including carriage, br'akages, and loss.

Q. Twenty-seven cents a gross?

A. Yes, sir. These are not the prices at which they were invoiced. When you asked me the cost I gave it to you. The package is of no value to us, but we count the cost of the package in, and the freight on them, and what are broken.

Q. What I wish to get at is what they actually cost you as you have them ready for use.

A. That is what I stated.

Q. The invoice price would be less than what you have stated?

A. Yes, sir.

721 Q. You have to add to that the expense of getting them to their places where you use them?

A. Yes, sir.

Q. Have you one of D'r McLean's large boxes?

A. No, sir, not here; but I can state without seeing it that D'r McLean's boxes will cost more than ours. It is rather heavier.

Q. Do you know from what sized paper the circular Exhibit Z is printed or cut?

A. I will not say positively, but my impression is 26 by 32. I think we cut eight out of a sheet 26 by 32; that is my best recollection.

Q. Can you state what number of circulars like K 2 would be obtained from such a sheet?

A. Well, there is a great difference in the paper as far as the size of the sheet is concerned. The paper-men don't go on cost of it. It is in the number of pounds to the ream; that is where they arrive at the cost.

Q. How does K 2 compare with yours?

A. It is very little bit larger than ours. The paper is heavier

722 for one thing. A sheet of the same size would cost more money. I am unable to say what the weight of the pa*r*e is.

Q. Do you think that paper is a heavier paper?

A. Yes, sir; the quality of the paper is about the same. I should judge on a sheet of the same size there is not more than three or four pounds.

Q. What does such paper cost in the market; do you know?

A. Paper at that time cost about 13½ cents a pound.

Q. You mean in 1871?

A. 1871 and 1872.

Q. What are you speaking of?

A. Of the paper used, about the same price, at that time.

Q. You mean that the paper on which both of them were printed at that time was worth that money?

A. Yes, sir.

Q. You say 13 cents?

A. 13½ cents.

Q. You speak now of both Z 3 and K 2?

A. Yes, sir.

Q. You are speaking of the years 1871 and 1872?

A. Yes, sir.

723 Q. What would be the difference in the cost of the paper between K 2 and Z 3?

A. Well, it ought not to be over 50 cents a thousand.

Q. It would be on the difference in the weight, would it?

A. The difference in the weight and size, altogether.

Q. Fifty cents a thousand, the circulars?

A. Yes, sir; four cents per gross.

Q. Did you ever put anything on your boxes like this? (Exhibiting a wax seal on Dr. McLean's boxes.)

A. No, sir.

Q. Do you know what it would cost to put that on a gross?

A. No, sir; I cannot tell. I never put anything of the kind on. We put on a label.

Q. Are you interested as a proprietor in the pills and medicines that your house put up?

A. Yes, sir.

Q. These pills that you speak of are liver pills?

A. Yes, sir.

724 Q. At what price do you sell them? I mean at retail, suppose you retailed them by the box?

A. You mean what the druggists retail them at?

Q. Yes.

A. Twenty-five cents a box.

(Counsel for D'r McLean objected to the irrelevancy of this testimony. Objection sustained.)

Q. (To D'r McLean.) Is that one of your boxes, doctor? (Exhibiting box marked Z 6.)

D'r MCLEAN. I think it is.

Q. (To the witness.) Please look at that box and state if you know what the cost of such a box is, per dozen or by the gross.

A. I know pretty near what a box like that ought to cost.

(Defendant's counsel objected to the competency of this testimony.)

The MASTER. I think the doctor is an expert in this business, and can give us his opinion as an expert.

WITNESS. Thirty-two dollars a thousand will pay for those boxes, that is, D'r McLean's gross-box, marked "Exhibit Z 6."

725 Q. (By Mr. Stratton.) That don't include the label?

A. No, sir; that don't include the label. That is a separate item.

M'r GRAY. You speak of the difference between K 2 and Z 3, these two circulars, not being over fifty cents a thousand?

A. Yes, sir; that is, the circular K 2 would not cost more than 50 cents more than Z 3 by the thousand.

Q. How do you buy stamps?

A. We buy stamps in thousand-dollar packages—a thousand dollars' worth.

Q. Do you get any discount on them?

A. We get 10% off.

Q. How was it in 1871 and 1872?

A. Did not get so much then.

Q. What discount did you get then?

A. We don't get but 5% off at that time.

Q. Did you buy them in thousand-dollar packages then?

A. No, sir.

Q. Do you know what the discount was when they were bought in thousand-dollar packages in 1870, 1871-2?

A. I do not.

726 Q. Do you for either of those years—1871 or 1872?

A. No, sir; I would not say positively. We have been buying stamps ever since 1870. The latter part of 1870—I think in 1871—we commenced getting 10% off. We did not get so large a quantity before that. We were getting $500 worth, and only got 5% off, but I don't know whether we were getting 10% off prior to that or not.

Q. In 1871 you commenced buying thousand-dollar packages?

A. Yes, sir.

Q. And then you got 10% off?

A. Yes, sir.

Q. That is your proprietary stamp?

A. Yes, sir; our own private stamps.

Q. Look at the stamp on Exhibit Z 4 and state whether that is your stamp.

A. Yes, sir; that is our stamp.

Q. Do you know whether it was in 1871 and 1872 the custom of the government in selling a quantity of one thousand dollars to make that discount; in 1871——

Q. ——

A. Yes, sir.

Q. You are speaking of this as 10% off. State the nature of the transaction.

727 We would buy a thousand dollars' worth, and we would have the discount in stamps, that is, we would get $1,100 worth of stamps for $1,000.

Q. You have made an estimate of the whole cost of that gross, including the cost of the material of which the pills are made?

A. Yes, sir.

Q. What is that cost per gross, excluding the material of which the pills are made?

(Defendant's counsel objected to the question as incompetent. The master overruled the objection.)

A. This may not exactly agree with our figures, if I give you our estimate as to what it cost. I will answer the question in my own way. The material in making the pills, not the medicine but the labor, in 1871 and 1872, cost us $1.75½, that did not take them out of the upper floor; that left them up stairs; that had nothing to do with the gross package.

Q. That is the labor?

A. Yes, and the material that excludes the cost of the circular, Z 3.

Q. Now, what remains to be done after that; what labor or ex-

728 pense is to be added to the $1.75½, to get them in the gross boxes ready for market?

A. They had to be brought down stairs, passed through two hands, put in boxes, and the boxes stenciled.

Q. In what shape did this $1.75½ leave them?

A. It leaves them in this box filled, Z 5.

Q. And you estimate the bringing of them down at five cents a dozen?

A. Yes, sir.

Q. Now, can you tell how much is to be added to the $1.75½?

A. It would take about 25 cents, as near as I can come to it.

Q. For doing what?

A. Bringing them down stairs and packing them in packages for shipping.

Q. Including the cost per gross?

A. Yes, sir.

Q. Then the cost of the circular, Z 3, would have to be added to this estimate to get the exact cost?

A. That is not in the cost of the goods. It might be considered so by other parties, but we do not; that advertises the other goods more than it does the liver pills, and that is advertising expense.

729 Q. Then, as it appears, the advertisement you consider as belonging to the other goods?

A. Yes, sir.

Q. In this statement that you have given here, have you included the stamps that go on the boxes?

A. No, sir, I have not.

Q. And the stamps would have to be added?

A. Yes, sir.

Cross-examination by defendant's counsel:

Q. (By M'r Reber.) What pills have you been preparing and selling?

A. D'r Hartus' liver pills.

Q. How long have you been making liver pills?

A. About four and a half years.

Q. In the items of labor which you have given, do you include anything more than wages paid for doing the work?

A. You mean labor?

Q. Yes.

A. That is all I include—wages.

Q. Simply labor?

A. Doing the actual work, that is all I have been asked about.

730 Q. You don't include of course clerk-hire, bookkeeping, rent, and such things connected with your business?

A. No, sir; we don't consider that properly the cost of the goods: that is not considered so in any business—the cost of any material. It would be a very hard matter to arrive at it from the fact the sales are not equal, and if they are it is impossible to arrive at the cost in that way.

Q. It is part of the cost of the business, is it not?

A. It is expense, not cost.

Q. The pill-boxes cost according to their size, if they are the same quality, don't they?

A. According to their size, yes, sir.

Q. If that box, K 2, in point of fact, costs 35 cents per gross, what would you say, sir, as to whether that was a reasonable or proper cost?

A. I should think it was an exorbitant price for that—I know it to be, for I have bought them for years in large quantities at the lowest prices, and I know how they can be got.

Q. For the same size?

731 A similar size to that, that is the same size, but not since I have been in this business, but when I was in the drug business.

Q. In 1871 and 1872?

A. No, sir.

Q. When?

A. In 1868-'9 and prior.

Q. Do you know what Dr. McLean's sized boxes cost in 1870-'1-'2?

A. I would not say in fact, for I was not buying goods in the quantity that D'r McLean bought them at that time, but I know that I could buy them for less than 35 cents at that time in the quantities that I bought them in small lots.

Q. At that time in 1868 and before that?

A. In 1869.

Q. And before that?

A. Yes, sir.

Q. Now the paper which is used in connection with the Patent Pills, the cost of it depends on the quality, doesn't it?

A. Yes, sir, on the quality.

Q. You say that a certain quality of paper was worth 13½ cents a pound. Do you remember what quality of paper that was?

732 A. The best newspaper, the best rag, as the term is used by paper men.

Q. Are you confident, sir, that you are not below the market as to the price?

A. I am positive, for I know that is what we paid for paper at the time; that is all I have to judge by.

Q. Did you buy any paper from Mr. Holmes, the paper dealer, here?

A. No, sir; we never bought a pound of paper here. I have priced the paper, but not at that time.

Q. Do you know what D'r McLean paid him for that?

A. I do not know anything about D'r McLean's business. It is not my business to know.

Q. When you speak of the cost of a box and labels of D'r McLean's pills, you give your opinion from your knowledge of your own business?

A. Yes; knowledge of my own business, and what parties tell us they make the boxes for other parties for?

Q. You say, doctor, that you did not include the circular marked Z 3 in the cost of the pill, because other medicines are advertised in that circular?

A. Yes, sir.

733 Q. Well, if you were going to arrive at the cost of other medicines, would you include the cost of the circulars in that?

A. No, sir; we count that in general expenses the same as clerk-hire or house-rent?

Q. The cost of the medicines, when you speak of that, you speak simply of the cost of the material and the putting of it up?

A. The medicine and the material for putting it up and the labor—that is, the bare cost of the goods.

Q. You don't speak of the general printing expenses?

A. No, sir; nor of the general expenses of the business.

Q. In making up pills, doctor, is there any waste or loss of material?

A. If a man understands his business and is careful it is carelessness to lose anything or waste.

Q. You lose nothing?

A. No, sir, except—well, probably might lose an ounce or so in making probably three hundred dozen pills. It is carelessness; there

734 is no reason for any loss. If a man is careful, at least that is my experience in *the* doing business, you get as many pounds of pills as you use pounds of material, of course, for the moisture will more than make up for the loss.

Q. What moisture do you speak of?

A. I decline to answer that question.

Q. I will put the question: What moisture do you use, what material do you use in the way of moistening?

A. I decline to answer that question what material.

(Plaintiff's counsel objected to the question on account of irrelevancy. Objection sustained.)

Q. Now I will ask you, doctor, what proportion of moisture you use?

A. That I will answer with pleasure. In three hundred dozen pills we use five pints.

Q. Now I will put this question: Do the pills which are made out of a given quantity of material in weight weigh as much after they are made as the material used in making them?

735 A. According to the estimate, as far as the weight is concerned, that is a matter of nothing at all, the pills will dwindle away into a slightly smaller size; of course they will dry out, have to dry, before they are put in the boxes, or they will mildew. Of course it is expected that they will lose their moisture. The moisture is put in to prevent their losing shape and the pills are put up so as to dry them when put up en masse.

Q. I want to know whether the pills, immediately after they are

made from a given quantity of material, will contain as much weight, be as heavy, as the material used in them?

A. The number of pills is the same, but the weight is less the longer they stand.

Q. (By M'r Gray.) He asks, As soon as they are made?

A. No, sir: they are the same.

Q. (By Judge Reber.) You say, then, the pills will weigh as much as the material used in making them?

A. Yes, sir; I know that, for sometimes I have been a little doubtful whether I had got in all the materials or not, and have weighed
736 them separately, after I got the pills massed, to see whether they did weigh as much, knowing how much I have: and I have weighed it, and by that means I am enabled to answer that certainly.

Q. You had as much of the pills in weight as you had material?

A. Yes, sir, or more; that is, counting this recipient out.

Q. By counting that in?

A. Of course, counting it in, they would lose a little by sticking to the pan.

Q. That is what I wished to know—whether there is not some loss?

A. As I said before, probably about an ounce.

M'r GRAY. Out of what quantity?

A. Well, we make three hundred dozen at a time.

Q. (By Judge Reber.) How did you happen to be a witness here?

A. The first thing I knew—I was sitting at my desk—a subpœna came to me. That is all I know; no parties have approached me in regard to coming as a witness. I was sitting at my desk to-day,
737 at one o'clock, when the subpœna came to me. That is the first anybody said anything to me about coming.

Q. How did you happen to have these estimates made, so that you could detail them to the master?

A. I have charge of the manufacturing department, and it is my business to keep posted about my business, and I know all its details.

Q. Were you informed after you came here, and before you were examined, as to what subject you were to be examined upon?

A. I was; and that is all I have—that paper: of course, I did not bring a detailed account of all my work.

Q. Who talked with you as to what your testimony would be?

A. Nobody talked with me as to what my testimony would be; a slip of paper was given me—no name signed to it at all.

Q. Were you not requested to make certain estimates, and bring them here, and testify about the cost of the pills?

A. There was a little sheet of paper, as I said before, a small
738 piece of paper, written with a lead-pencil, no signature at all, brought at the same time the subpœna was—just a statement as to what I would be required to testify about.

Q. From whom did that come?

A. I cannot say; there was no signature to it.

Q. Have you no information as to whom it came from?

A. I have an idea where it came from; I think I know; I would not say positively.

Q. Do you know M'r Porter, here present?

A. I have been introduced to him once.

Q. Have you talked with him about this case?

A. Yes, sir.

Q. Have you talked with him about the subject he wanted you to testify about?

A. No, sir.

Q. Have you talked with the , M'r Gray and M'r Denison?

A. No, sir.

Q. Have you talked to anybody, or has anybody talked to you?

739 A. I have not had much time. As I said, at one o'clock I was sitting at my desk, when the subpœna came in with this slip of paper. I had an idea that I would be called.

Q. How did you get that idea?

A. From outside talk.

Q. Who told you you would probably be called?

A. Well, I was told by one of my partners that I would probably be called.

Q. Who is your partner?

A. I have four.

Q. Who is the partner that told you?

A. M'r E. H. Franklin.

Q. Didn't he intimate to you what subject you were expected to testify about?

A. No, sir; for he did not know. He said I would probably be called as an expert.

Q. The first you knew of the subjects you were to be asked about was at 1 o'clock to-day?

A. One o'clock to-day.

Q. How did you make up these estimates, then?

A. I made up these estimates from my book.

Q. How long were you at it?

740 A. About half an hour. The reason I made it *it* in this way is that in my book it is in a different shape from this. I got them into the gross price per gross. I have shown according to the amounts we make up at the time. That is the way I have the estimates made, and by single box.

Q. You were not requested to go and did not go into the general expense of the business?

A. No, sir; I refused to do it. I have no object in this at all one way or the other. I am just as much a friend to one as I am to the other, and I regretted coming at all.

Q. How do you have your pills put up, by hiring day labor or by contract?

A. By day labor.

Q. This estimate was formed, then, on the amount of wages paid for daily labor?

A. Yes, sir.

Q. The parties who make up these pills and who do the labor, are they engaged alone in making up pills, or are they engaged in the other branches of your business?

A. They do nothing but making the pills. We keep one set of

741 hands for one regular line of business. We don't change, and they become experts, of course. That is the only way we can reduce the cost of our goods.

Q. You have reduced the cost to the very lowest figure, have you?

A. Yes, sir. Well, at that time: that was the lowest figure at that time.

Q. You are able to systematize your business so it could be done at the very lowest figure?

A. Yes, sir.

Q. Your business of manufacturing liver-pills, the business of D'r

Fl ming in liver-pills, and D'r McLean are to some extent rivals, are they not?

A. All conflict with each other. Fleming & Bro., at Pittsburgh, are just as much rivals as D'r McLean—have conflicting interests. All go to the same territory, and their pills are advertised to accomplish the same that ours do.

Q. I will ask you whether the figures which you have given of the cost of your own pills are estimates, or whether they are the actual cost taken from your books?

A. They are the cost taken from the books.

742 Q. During what period?

A. We make an estimate every year. This estimate is of the actual cost during the year.

Q. During that time, 1871 & 1872?

A. Yes, sir; these are estimates at that time.

Q. Well, sometimes you paid more for wages than at other times?

A. No, sir; our wages have been the same all the time. There is no change in the wages. Printing and everything of the kind, of course, is coming down all the time, and has been for the last three or four years. It fluctuates.

Q. Don't paper fluctuate; sometimes higher and sometimes lower?

A. Well, it is very low now. It has been 3½ cents higher than now.

Q. It is not an article that fluctuates from month to month and year to year?

Q. Not with us so much. In the last three or four years it has been on the decline all the time.

Q. All the time?

743 A. All the time, so far as I have been able to know. I will say positively in the last two years that paper has been on the decline. Up to that time I will not say positive, but I think it has.

Re-examination by plaintiff's counsel:

Q. (By M'r Gray.) Do you know whether boxes of the description of Z or K 2 were higher or lower in 1870 and 1871 and in 1868–'69–'70?

A. Well, they were about the same price with us—paying about the same price.

Q. About the same price in 1871 or 1872 as in 1868 and 1869?

A. Well, I don't know; I was not in the medicine business at that time, and I don't know what they paid for the boxes; in 1870 and 1871 about the same.

Q. I understand that you bought in 1869 boxes of that description, K 2.

A. Yes, sir.

Q. I understand you to say that in 1868–'69 you bought boxes of that size, of the size of K 2?

A. Yes, sir.

Q. And at that time you bought them at 27 cents; was that your statement?

744 A. No, sir. I said the boxes of D'r McLean were worth about twenty-seven cents in 1871 and 1872. I did not say I bought them at that. I said they were worth about that.

Q. At what price did you buy them in 1868–'9?

A. I do not recollect; but I know it was less than thirty five cents, the price he said.

Q. Do you recollect whether there had been any change in the price between 1868–'9 and 1871–'2?

A. I do not.

Q. Have you got with you the pencil-memorandum that you said was laid on your desk at the same time with the subpœna?

A. I don't think I have; I will see. Yes; there it is.

M'r GRAY (to M'r Reber). Do you wish to look at this memorandum?

Judge REBER. No, sir.

Judge REBER (to witness). I will ask this question which I ought to have asked before: You speak of the expense of the business; I will ask you what you mean by expense of the business?

745 A. Various things; advertising for one thing; clerical force for another; travelers for another; and items necessary for carrying on the business, house-rent, fuel, &c.

Q. Freight?

A. Yes; freight is an expense.

Q. Porterage?

A. Labor, we call that cost; that we don't consider expense. The mere labor of making the thing, we call that cost; and everything connected with the business outside of the purchase of goods, we consider expense.

Q. Well, in order to ascertain the profit that you make upon any particular medicine, or upon all the medicine you sell, you have to deduct the cost of making the medicine and all the expense of the business, don't you?

A. We give them in the sum-total; yes, sir.

Q. There is no profit until the cost is paid, and all the expense is paid?

A. Certainly not.

746 Q. Well, the cost of making and getting up the medicines is only a comparatively small proportion of the aggregate cost of the business, is it?

A. Yes, sir.

Q. Advertising is a very heavy item, is it not?

A. The largest one.

Q. Agencies, are they expensive?

A. Traveling agents, yes; good ones are.

Q. They constitute a large portion of the expense of the business, a very considerable item?

A. One of the large items; yes.

Q. What are the other big items?

A. Well, we have to carry on the business; a bookkeeper, of course, is a very large expense; clerical force is expensive, good clerical force.

Q. House-rent?

A. House-rent.

Q. (By M'r GRAY.) In estimating the cost of these pills, you have included freight, have you, as far as they are concerned?

A. Not freight; of course, in selling the goods, the customer pays the freight.

Q. I mean the freight on the articles.

A. Certainly; that is always cost.

747 Q. Then when you speak of freight, you speak of freight that you ship and sell?

A. Yes; we don't count that on freight on goods to the customer or buyer.

Q. How many articles do you manufacture?

A. We have nine.

Q. How do you divide the expenses between those nine, or have you ever done it?

A. Well, we keep a detailed account of each article; how much of it goes out each week and month. At the end of the year, we strike a balance-sheet to see what the profits are, and it is a very easy matter to get the proportion of expense to each article.

Q. That is, you charge each article with its own expense?

A. Well, that is only for convenience sake that we do that. We don't do that in any general business. All goes to shipping-account of different articles.

Q. You keep the account with each of the articles?

748 A. Well, we keep a separate account of every article that goes out—the number of dozen. We know just how many dozen of each gross out each week and each month, and at the end of the year, when we strike a balance-sheet to see the profit of the business, to know the profit of each article, then we can easily find the proportion, and that is the only way to arrive at it.

Q. The question then of profit on each article, you can find out?

A. Yes, sir; and know what each article costs us.

Q. Do you charge up? For instance, suppose you were manufacturing five articles. Take your own goods; you say you manufacture nine articles. Now, how do you divide your general expenses among those articles in getting at the cost or profit on each?

A. Well, as I said before, we don't consider that the cost of the goods. All business is attended with expense—any mercantile business—and we cannot divide up the cost of each article by clerical force and house-rent, and so on. It would be an endless job to arrive at any price.

Q. So the way to get at the cost of the article is the way you have done here?

749 A. That is the legitimate way to find the cost of the articles.

Q. That is, to take the cost of the materials and the labor and put it all together, and that makes the cost of the articles?

A. Yes, sir; it is very easy to divide it by nine and add that one-ninth to the whole thing and arrive at some kind of cost; but in my opinion that is not the cost of the goods.

Q. Would that give the actual cost?

A. It is not the truthful one, and it is not a business way of doing things.

Q. What would be a business way?

A. As I stated before, to get the cost of the goods, and let all these other items go to expense-account.

Q. If you were called on to ascertain the profit you had made on *the* a particular article which you have manufactured and sold, and your object was to learn what you had made on it, what would you take into account?

(Defendant's counsel objected to the question. Objection sustained.)

750 Q. Suppose in selling your different articles you sold ten times as much of one article as you did of another, could you apportion that expense among your different articles? How would you apportion it?

(Defendant's counsel objected to the question. Objection sustained.)

At this point the examination was adjourned until Monday, October 5th.

S'T LOUIS, *October* 12*th*, 1874.

Met pursuant to adjournment. Present as before.

D'r J. H. McLEAN, recalled, testified as follows:

Q. (By M'r Denison): The question I wish to have answered is, which are the ingredients used in making your pills?

A. Do you want each quantity of each article?

Q. Yes.

A. Four pounds of English Castile soap; 4½ pounds podophyllin —alc*h*oholic extract with podophyllin in it. (There is a great difference in this: that is, the resin in it. It is the resinoid or
751 active principle of the root that is in it.) Four pounds of powdered black root; 3 pounds of Socotrine aloes; 3 pounds powdered gamboge; 8 pounds of calomel; ½ pound of Cayenne pepper. That is the recipe. That is what we call a batch.

Q. What is the total?

A. I have not footed it up. (Figures.) Twenty-six pounds, made into 5-grain pills.

Q. Does that make what you call a batch of mass?

A. Yes.

Q. Do you always mix it up in that way—in that proportion?

A. Yes, sir.

Q. How many pills will that *m*atch of *b*ass make?

A. I can't tell you that. Made into 5 grain pills, you can ascertain the number of pounds; reduce it to grains, and you can get it exactly. (Figures.) It makes twenty-six pounds, even, of 5-grain pills, twenty-five to twenty-six pills to the box.

Q. Do you make the same sized pills?

A. Of course, one machine for making it. It comes out of that
752 in 5-grain pills all the time.

Q. Can you tell from computation how many gross of pills a batch of this mass will make?

A. Yes; from computation I could, but I have not computed it, however. I did in the former answer. I computed the amount and the net cost of the batch—the net cost per pound.

Q. The net cost per pound of what?

A. Of this material. I have forgotten what I put it at, but I got this out a few minutes before I came up here. I thought that was the question you wanted to get at. You can easily compute this yourself.

Q. The alc*h*oholic extract of po*t*ophyllin, is there not some weight in that?

A. We buy it by the pound. It is like molasses.

Q. Have you given the number of pounds in that?

A. Yes; 4½ pounds of po*t*ophyllin.

Q. That is the same item that you afterwards spoke of as alc*h*oholic?

A. There are two extracts of po*t*ophyllin; one is made of water
753 and has none of the resinoids in it. The other is made with alcohol; that extracts resinoids from the roots and costs a great deal more than common po*t*ophyllin. That is more costly than common po*t*ophyllin and we believe it better and use it, because I pay more for it for the purpose of getting a good article.

Q. Is this the way you have always prepared your pills?

A. No, sir.

Q. How long have you prepared them in this manner after this formula?

A. I guess maybe six or seven years, if I recollect right.

Q. Can you fix the time any nearer?

A. No, sir; I cannot when I believe I can change the formula so that it will be better than before I do it.

Q. How long since you have made a change?

A. I made a change a year ago or a year and a half. I don't recollect exactly, but some short time ago.

Q. Changed to this formula which you have given?

A. No, sir; I have taken from it.

754 Q. Is this the formula used by you the 9th of November, 1871, and subsequently?

A. I think so; that is the reason I put it down. I will explain this matter. I will take from one article, for instance, if I find it is a little too drastic; and I take from one article and reduce it, as I have done since that time.

Q. I am inquiring as to what you have used since the 9th of November, 1870.

A. I am speaking of that date, from the 9th of November to May 21st, and my recollection is this is the exact recipe I had then; the only difference between that and the present time is that I have reduced two items in this, making a very little change in it.

Q. When did you make that change?

A. About a year and a half ago, if I recollect right.

Q. From November 9th, 1870, down to about a year and a half ago, these were the materials which you used in making your pills?

A. Yes, sir.

755 Q. You spoke in your previous examination about a batch containing forty-two pounds of mass.

A. Double this batch, and then a reduction of that to the present time amounts to about forty-two pounds.

Q. What reduction do you mean?

A. I reduced two items here four pounds; that would make it about, I believe. If you will notice, in my previous examination it was from guess more than the other, but that would have no effect on the item; it is in regard to value.

Q. How many gross of pills could be made from a pound of this mass?

A. 5 grains. Make a pound into 5 grains, reduce it to grains, and divide it by 5, and that will make it exactly. There are twenty-five pills to each box, sometimes twenty-six. I can figure it if you want. 1,536 pills divided by twenty-five gives exactly the amount—one pound—in 7,680 grains; and that divided by five leaves 1,536 pills, which would be sixty-one boxes and a half-box. One pound makes sixty-*two* boxes and a half.

756 Q. Are the pounds as given by you in your first statement pounds avoirdupois or apothecary's weight?

A. Avoirdupois, the way I get it.

Q. In making these computations, you have to allow for the difference in weight between avoirdupois and apothecary's, don't you?

A. The way we weigh it on the scales, we take our grain-scales and weigh an ounce. Sixteen ounce to the pound.

Q. In weighing out this material you weight avoirdupois weight, and then when you come to divide up your pills you put 5 grains of mass, apothecary's weight, into each pill?

A. Yes.

Q. And that makes how many pills to the pound?

A. 1,536, divide that by 25 to the box, makes the 62½ boxes.

Q. Do you weight out each pill from the mass?

A. No, sir.

Q. After you make a batch of this mass, do you not subdivide it?

A. No, sir; never subdivide it; we have a machine that we put it in and it comes out in a pipe, and it is cut off with a cutter, and that
757 cutter cuts 5-grain pills. As the cutter wears off it makes a little more than 5 grains, makes 6-grain pills after it wears off, and then we fix it over again. Our aim is to get a 5-grain pill.

Q. You subdivide it by cutting, rather than weighing each pill or box?

A. Yes; of course; we wouldn't weigh each box, we make two batches of them a day, now, and sometimes three a day.

Q. Your calculation is that a certain bulk of the mass will make a certain number of pills?

A. Less the shrinkage of the pills.

Q. What do you mean by the shrinkage?

A. This extract is very much like syrup. The extracts are like syrup, and when they dry off, the water, or alcoholic portion, evaporates, and that is a shrinkage; then there is a waste in the cutting.

Q. Does that diminish the volume of the mass?

A. Yes, sir.

Q. How much?

A. I don't know.

758 Q. You weigh 5 grain pills after they are dry?

A. Not before they are dry; after they are dry.

Q. If you don't weigh them, if you determine the question of there being 5 grains by the cutter which you use, what difference would it make whether they were wet or dry?

A. Because the cutter is made to allow for shrinkage. The cutters are made in that way.

Q. Do you add any water at any stage?

A. If it need it.

Q. Under what circumstances does it need it?

A. If the extract is very soft. Sometimes these extract makers—I buy mine from one person, and sometimes from another. Tilden makes very fine extracts, because he takes a little more of the resinoid out of it. If the extract is very thin, we don't need to use much water.

Q. How often do you use water?

A. I can't tell. If the extract gets old the water evaporates itself.

Q. Then you have to restore it?

759 A. Yes, by water or alcohol, as we see proper.

Q. If the extracts are dry, don't you add water to give it the proper stiffness?

A. Certainly; O, yes.

Q. If it had evaporated then you would have to restore the moisture which had evaporated by the use of water?

A. Yes.

Q. How, then, would the volume be effected by evaporation at the time you want to make up the mass?

A. It would be greater; the volume would be a larger quantity.

Q. After you had put in the moisture—the water?

A. Yes.

Q. Don't you always put water into the soap?

A. Well, not always; if we have a very soft extract we use the soap and water together.

Q. Did you ever use it without using some water?

A. I don't recollect. I have, I think, used it both with and
760 without water. Sometimes when I get a very thin extract then I would use no water, because you can make it too thin, then it would require more powders than we are allowed in the recipe.

Q. What weight of water has to be added to give it the necessary stiffness?

A. It is altogether owing to the consistency of the extracts; if they are dry, we have to use a certain amount of water; if they are very thick, we used a certain amount; and if they are very thin we don't use any water at all. I can't stipulate what we shall use, so that we get the quantities thick enough—boiled down into that—has to be boiled.

Q. Do you weigh the water that you put in?

A. Yes.

Q. For what purpose?

A. To get the exact consistency to see how much water we want to reduce it, then we have to boil it a certain length of time to get it back to the consistency that we want. I don't see that this is material to value the price of these things; water don't cost a cent.

761 Q. I am trying to get at this matter of shrinkage. It has been testified that a certain loss takes place by evaporation during the process of manufacture.

A. Well, I have told you that the extract is according to the thickness and thinness. I see what you are after now; all these are dry, every one.

Q. That is, the extract is dry?

A. No, sir. I said all the other is dry except the extract. The castile-soap, if we get a very fresh extract from the factory, is very thin, and therefore we don't need to use but very little of water; but the shrinkage is on the amount of extract. No shrinkage except that extract.

Q. How do you account for the item of shrinkage of material stated by you to be $1.30 a gross in manufacturing?

A. I believe you will find that shrinkage and waste.

Q. How much of that is shrinkage and waste?

762 A. I can't tell you. We weigh and estimate it.

Q. Is there any other item of cost of manufacturing the mass for pills than the cost of material as given by you here?

A. There is cost in making it up, and cost in materials for manufacturing.

Q. I am speaking of materials alone.

A. I am speaking of manufacturing alone. We have to roll these pills.

Q. I am not speaking of the labor.

A. No, I am not. I am speaking of material for the purpose of rolling. We have to have powders to roll it.

Q. The question I asked is, is there any other item of cost of manufacturing the mass for pills than the cost of the materials as given by you here?

A. Yes; slippery-elm; that we use for rolling besides that. I hadn't thought of that until you called my attention to it.

Q. How much of that?

A. A pound to a gross—that would be two pounds to a batch. I guess at that now: say two pounds to a batch.

763 Q. Do you use that before the pill is cut off by the cutter?

A. No, sir; it is during the time it is cut off.

Q. How is it used?

A. It is spread upon it so it will not stick to the pills in passing it over; then we use it to throw into the dryers to dry the pills.

Q. Does it adhere to the mass?

A. Yes, sir; it keeps the mass from sticking to any of the material.

Q. It does adhere to the mass?

A. No, sir; not at all; you have seen them make brick; they have to throw in sand to keep the clay from sticking to the wood, and we do this on the same principle.

Q. Is there any other shrinkage of this mass during the manufacture than that caused by evaporation?

A. Nothing, except as I stated, loses that would follow in the process of making.

Q. What are they?

A. In the first place, sticking to the pot and sticking in the machine and carelessness in the girls.

764 Q. What percentage is lost by that?

A. I can't tell you. In making up my estimates I have to assume that. I have to assume what a certain amount of pills would cost me to bring up the amount, and I have to assume that much in my usual balance-sheets.

Q. Is that estimate an accurate one?

A. Yes, as near as I could get at it without coming right down to facts, weighing this and going backward and forward and watching and stating the fact. I make an estimate as near as I can, in justice to myself and to my books.

Q. Then these figures reduced to grains would give exactly that quantity of pills?

A. Yes; less the shrinkage there would be in that mass.

Q. Shrinkage in weight or volume?

A. In weight, and that would turn out less pills in consequence.

Q. Would there be a shrinkage in the mass?

A. Yes; because the extract, as I told you, would be thin and the pills dry.

Q. How much?

765 A. I can't tell.

Q. Are the pills dry when they are first made?

A. No, sir.

Q. What do you mean by their being dry, at what time?

A. Dry at the time they are put into the boxes.

Q. Are they reweighed after they are cut off?

A. No, sir.

Q. What difference would this shrinkage make in their cost, if the pills are already made and placed in the boxes?

A. Yes, but if the pills are not already made it is wet, and we dry it, and this evaporation takes place just the same as though powders; it would be the difference between the extract and powders.

Q. After they are dry do you add anything to them?

A. No, sir.

Q. There would be just as many pills after they are dry as before?

A. Yes; no more than when just cut. Probably they would

766 weigh 6½ grains, whereas they would only weigh 5 grains dry. If you want me to weigh them I will weigh a lot of wet pills; they would not weigh more than five grains if cut exactly five grains.

Q. Do you cut more than 5 grains?

A. As a matter of course my machine is made to cut more than five grains.

Q. How much more?

A. I can't tell you, because I have weighed the pills, and the pills are five grains.

Q. Then you ascertain the weight of the pills by actually weighing them, do you?

A. Yes, sir.

Q. That is where you get the five grains?

A. That is what we make the calculation, as much we can; we calculate to give five grains.

Q. Why do you divide this number of grains in the wet mass by 5 to ascertain the number of pills it would contain?

A. You asked me the number of pills a pound of dry mass
767 would contain, and I figured it for you; there is 4½ pounds of the extract, and make calculations of how much that wet extract will reduce.

Q. Then you have given everything here?

A. Except the slippery elm to powder.

Q. How much slippery elm would adhere to this mass?

A. Two pounds to the batch.

Q. Then the whole batch would be twenty-eight pounds instead of twenty-six?

A. No, sir; it would not be a batch at all, for that part would be given and there would be no more powder there. When they are taken out and coated, then, of course, that powder is all taken off.

Q. I understand you to make a batch of pills as stated, you are obliged to use a pound of slippery elm?

A. Yes, sir; to keep them from sticking after they are in the dryers to dry; they are not distributed all through the dryers; the pills are thrown on this powdered surface, and after they are through the
768 powders and the scrapings all go together.

Q. In your computation you have given correct statements of the number of pills you make out of one batch, have you?

A. Well, that is just my recipe as I have had it all the time.

Q. And to obtain the number of pills that can be made out of it it should be reduced to grains, apothecary's weight, and divided by five?

A. Yes; then you get the number of pills exactly.

Q. Why do you divide it by five?

A. Why? You have to divide the grains by five.

Q. So as to get the number of pills?

A. Of course. If you have 5-grain pills it is 5-grain dry pills.

Q. Are you able to state *to state* the prices which you have paid for castile soap used in manufacturing the pills put up and sold by you from the 9th of November, 1870, to the present time?

A. No, sir; I can only approximate it. I have not the bills of that date.

Q. Why can you not state it from the 9th of November, 1870,
769 to the time of the decree of June 4th? Why are you not able to state the amounts which you have paid for castile soap used by you in manufacturing these pills?

A. I can approximate it. It advances and falls according to the market.

Q. I am not speaking of the market. I am speaking of the amounts you have paid for material which you have used.

A. Castile soap is altogether governed by the market supply and demand; sometimes it is one price and sometimes it is another, according to the quantity in the market.

Q. I am not speaking of the market value.

A. What I paid for it is the market value.

Q. I am asking whether you are able to state the price you paid?

A. I am not, only as I can approximate from recollection.

Q. Can you state what those prices were which you paid, from your books or receipts in your possession?

770 A. No, sir. Allow me to explain a moment—what is the use in going over it and making an account? All these druggists, they have accounts with us; we never take any from them, our account is so much greater with them; we receive bills from them and *and* they are *they are* torn up, and that is the end of it.

Q. Will the books in your possession show what you paid?

A. No; they will not.

Q. Can you from your books or bills or receipts in your possession show what you actually paid for all those other items?

A. No, sir; I cannot. We buy from dealers; sometimes from manufacturers.

Q. The question is whether as a matter of fact you can tell?

A. No, sir; I can't. You think I am keeping back things what is not so, but I am not.

Q. You can t tell exactly the prices you paid for these materials since November 9th, 187 ?

A. No, sir.

Q. Have you any means of ascertaining the prices you paid for articles during those times?

771 A. No, sir. These were all purchased from deale's, and the consequence is, we have no credit on the amount of the bill. The bill is receipted, and it is the end of the transaction. If they owed us, then we would get a bill from them. Then we would have the items of the bill.

Q. Can you tell from whom you purchased those different materials?

A. No, sir. Sometimes we would buy in New York, sometimes in S't Louis, sometimes of one dealer and sometimes of another. I can't tell.

Q. Have you any means of ascertaining that from the books and papers in your possession?

A. No, sir.

Q. Or any other means?

A. I don't know that I have. I have made some amounts there, as near as I can get at it. I have no other means of knowing.

Q. Is that your statement as to all these materials, that you cannot tell from whom you bought?

A. Yes, sir.

Q. Nor where?

A. No, sir.

772 Q. How long have you been putting a coating upon your pills?

A. Six or seven years ago.

Q. What kind of coating do you use?

A. I use now the white coating.

Q. What kind did you use upon the 9th of November, 1870?

A. Gelatin and slippery elm.

Q. Does this statement furnished by you mention the materials of which you make the coating?

A. No, sir. It does not mention the materials, for that was not considered, and that is another thing. I had forgotten about that.

Q. Are the pills contained in box marked "K 2," coated in the manner you speak of?

A. I believe so. (Examines.) Yes, they are.

Q. Coated with what?

A. With starch, slippery elm, and gelatin.

Q. Is that process of coating with this material the same that you used in coating with white sugar?

A. No, sir.

Q. I am asking about the process?

A. No, sir.

773 Q. What is the difference?

A. We use an entire different plan now from what we did then.

Q. What was the method of coating you used from the 9th of November, 1870, to June, 1874?

A. In a common pan, of shaking the pan and making this liquid-matter coat—gelatin and slippery-elm bark.

Q. Were all the pills you made and sold during that time coated in that manner?

A. I don't recollect as to all of them. We were trying experiments then. We were running our pills pretty much all coated at that time. They are coated in that way, but there was a time when I did not coat them.

Q. Are you able to state what expense was incurred by you in coating, which you sold between those dates?

A. A great deal more than I estimated I paid for coating.

Q. Have you any means of stating the exact cost of the coating?

774 A. I was charged fifty cents a pound for coating any pills by Blanke & Bro.—my fever and ague pills; and I estimated in my part fifty cents a pound the same way. That is my recollection, that Blanke charged me fifty cents a pound for coating my fever and ague pills with sugar. The materials are not so much as the time and labor.

Q. I am not asking what the cost was, but if you were able to state what was the cost to you of coating your pills between the dates I have mentioned?

A. I cannot tell you.

Q. Why not?

A. I never estimated it; never kept it.

Q. Will not any of the entries in your books show what that cost was?

A. No, sir; I cannot possibly do it, because we have been experimenting for years; coating them with one sett of coating one month, may be different from another. The pills would not vary, but the coating would. We have been experimenting for 12 years on the coatings.

Q. You are not able to state in what manner the coating was done—was how many?

775 A. No, sir.

Q. Nor the cost of any process?

A. No, sir.

Q. In getting material for these pills did you uniformly use the same quality of goods?

A. Oh, yes; yes, uniformly.

Q. And the price you paid for them you say varied with the market?

A. Yes, sir.

Q. But you are not able to state what the exact prices were which you paid from time to time?

A. No, sir; as a dealer was a little in debt, and did not pay very well, I would buy from him, even though I had to pay big prices for them, sometimes, if I got the same quality of material in that way.

Q. That is where you could trade off what you considered a bad debt?

A. No, sir; I saw that sometimes dealers were slow in paying up, and rather than let the matter run on we would take it out in goods, therefore it would cost us a great deal more than the market price.

Q. Why should you do that for a debt that was good?

776 A. We would rather do it than make a suit or a fuss.

Q. You did it because you considered it more desirable and to your interest than to purchase for what you could buy for money in the market?

A. Yes; that's business. (To the reporter:) Put that down.

Q. Can you give the names of any parties here or elsewhere of whom you have at any made a purchase of any portion of these goods?

A. I will just say all the druggists in S't Louis—I don't think I could make any specialty of them—you may say all the druggists in S't Louis I buy of, more or less, and then other places, Louisville, Cincinnati, and Chicago, and wherever I see a thing in that way I prefer to do it in that way. I would take it out in that way; that is the natural way we do.

Q. Why do you buy in other place?

A. Because I saw a man was rather slow, and would not pay me very fast, and if I saw I could take it out in goods by that means, and

777 save any debt, it would be pleasant. Sometimes a man is short and could not pay money for a bill. Sometimes I take it out in goods, and sometimes pay you in round figures in that way, and we think it is policy.

Q. Can you give the name of any of these parties?

A. No, sir; I have dealt more or less with nearly every druggist in Louisville, Cincinnati, and Chicago.

Q. And S't Louis?

A. Yes, since the 9th of November, 1870, more or less, all around. I do a good deal of that cast. I can't help it, and I think I have bought some goods in Terre Haute and Indianapolis.

Cross-examination by Mr. Reber:

Q. Speaking of the coating of these pills, that costs something?

Ans. Yes; I consider what I pay for it to other parties fifty cents a pound. I paid Blanke fifty cents a pound for his coating.

(Counsel for complainant objected to any estimates unless the exact figures could be given.)

778 WITNESS. Well, I paid fifty cents a pound for another class of pill, which is about the same size, and considered I could do it just about as cheap as he could. That is all I know. I know it cost me twice as much, for I was experimenting all the time, working the matter to perfection. I lost a great many batches of pills in trying to get the proper coating.

Q. In making the pills out of the mass after you have rolled the material, I understand you to state there was some wastage or loss in cutting: how's that?

Ans. In putting the pills into a groove, there is a groove the pill rolls in, and we cut the roll off, and of course there is a piece on the end, maybe two ends; every time you make this motion a portion of each end of that mass will be small, little bits of things. They are allowed

to go in the dryer with the balance. You can't separate them. They all go in together, and these are cracklings, we call them, and they are mixed up with it and sifted out, but the large, good-sized pills
779 we put in here, and sometimes these cracklings they get in here. I see one or two are in there in this box. (Examines box.) This is a crackling, and there is another got into this box. These are thrown out. If we could keep them separate from the slippery elm, then we could soften them over and grind them in the pill machine and work them over.

Q. Can you state the percentage of loss in this respect?

A. No, sir; I have forgotten what it was in my estimate. I can't tell. I stated, when I had my mind on it, about what it was, but I can't state positively now.

Q. When do you mean you stated it?

Ans. In my former testimony I made an estimate and calculation as near as I could get it at the time in my first testimony there, but I have not paid any attention to it since. I have been engaged all day very much. I just drew this recipe off and did not take any account further.

Q. How many years have you been engaged in dealing in pill
780 and other medicines in S't Louis?

Ans. Twenty-four years and a half in S't Louis, since the year 1849—the winter of 1849.

Q. From 1860 down to the present time, what medicines have you been dealing in?

Ans. In McLean's Volcanic Oil Liniment, D'r McLean's Strengthening Cordial, D'r McLean's Universal Pills, D'r McLean's Candy Vermifuge.

Q. Is that all?

Ans. I have been manufacturing since that time, Chinoidine Sugar Pills.

Q. Since when?

Ans. I have forgotten without looking; some time in 1866 or 1867, I think it was, maybe earlier, my recollection is about that time; and D'r McLean's All-Healing Plaster, D'r McLean's Electric Relief; but I have not brought this into account at all, neither that or the healing plaster.

Q. What is the name?

Ans. D'r McLean's Electric Relief. It is Lightning.

Q. From November 9th, 1870, to the present time, what medi-
781 cines have you made and dealt in?

Ans. The same medicines that I spoke of.

Q. Have you had a place of business from November, 1870, down to this time in S't Louis?

Ans. Yes, sir.

Q. For carrying on this medicine business?

Ans. Yes, sir.

Q. Have you a store-house and manufacturing establishment?

Ans. Yes.

Q. Is your store house and manufacturing establishment used for the purpose of making these various medicines and carrying on the medicine business?

Ans. Yes, sir, alone; and do nothing else in it but that.

Q. Do you employ, and have you since November, 1870, employed clerks and other assistants in your business?

Ans. Oh, yes.

Q. State what is the value of the renting of the premises that you
782 have occupied in connection with this business from November, 1870, to the present time?

(Counsel for complainant objected to the question.)

Q. I believe you stated in your previous examination as to the expense of your business?

Ans. Yes, sir.

Q. The expenses of your business, the printing, paper, advertising, and so on, you stated what those were?

Ans. I stated it. It is not in that account, inasmuch as my store expenses are not mentioned, therefore I did not know I had to make that when I rendered that 'count.

At this point the further hearing of this case was adj'urned to Thursday, October 15th, 1874, at 2 o'clock p. m.

OCTOBER 15TH, 1874.

The parties met pursuant to adjournment, and the hearing of the case was resumed as follows:

783 D'r McLean. Examination resumed:

Q. (By M'r Reber.) In reply to my question the other day, you stated you had manufactured the Strengthened Plaster.

Ans. Yes, sir.

Q. And Electric Relief?

Ans. Yes, sir.

Q. When did you commence the manufacture of the medicines?

Ans. I have only made one batch of Electric Relief; three months ago. I have not sold any of it that I know of. The healing plaster I commenced about seven or eight months ago; some time last winter.

Q. That is the earliest period of which you manufactured these two medicines?

Ans. Yes.

Q. I will ask you, in reference to the general expenses of your business, which you stated were $25,000.00 per annum, I will ask you what these expenses included?

784 Ans. They include the store expenses and clerical labor.

(Counsel for defendant then offered in evidence an account. This paper filed, and marked "Amended Statement, Master's Exhibit No. 2."

Counsel for plaintiff objected. Master overruled objection. Plaintiff excepted thereto.)

The WITNESS. This is a detailed account. You will find a little difference in the amounts sold in this and that account (referring to Exhibit No. 1), which *which* is accounted for by M'r Taylor in taking down the amounts from the books. For instance, he came to one lot where he knew the store was burnt up, and he did not take that lot down; and he had in his memory what was burnt and lost, and that makes the difference between the 1,231 gross and 1,431 gross. He knew from memory what the losses were directly—the losses by fire and the losses in transit—and that makes the difference between this 1,231 and this fourteen hundred and some gross. This is the itemized account of

785 the books when he took down this for M'r Stratton. M'r Stratton told him how to take it down. What was lost by fire he did not enter them up, because he knew it was not necessary, and that was the reason why there was such a discrepancy between the amounts.

Q. The expenses of your business, as stated in that account, correspond with the expenses as stated in your testimony?

Ans. Certainly. In the way drawn out, they are detailed.

AUGUSTUS HENRY WEBER, being duly sworn as a witness on the part of the complainant, testified as follows:

Q. (By M'r Gray.) State your business occupation.

Ans. Druggist.

Q. Where?

Ans. 508 North Seventh street.

Q. In S't Louis?

Ans. Yes, sir.

Q. How long have you been in the business?

786 Ans. About fifteen years; over fifteen years.

Q. And in S't Louis during that time?

Ans. Yes, sir.

Q. State whether you made any sales of drugs to D'r James, to D'r McLean at any time after November 9th, 1870.

Ans. Yes, sir.

Q. With what house or houses have you been connected?

Ans. The firm of Brown, Weber & Graham, Wengler, Blow & Co., now Wengler & Co.

Q. November 9th, 1870, what houses were you with?

Ans. The house of Brown, Weber & Co. had a month before that failed. The next house after that was Magure, Wengler, Weber & Co.

Q. State whether you have sold him castile soap.

Ans. Yes, sir.

Q. Can you tell what dates or at what times?

Ans. I cannot tell the date: but right along through the year at various times.

Q. What year?

787 Ans. 1872. I remember particularly.

Q. Can you state at what prices?

Ans. Fourteen cents for castile soap, I noticed some bills.

Q. You say at different dates during the year 1872?

Ans. Yes, sir.

Q. How early in 1872 did you sell any?

Ans. I could not tell positively, but along through the year at various times.

Q. January, February, March, April, May?

Ans. Yes, sir.

Q. At the prices you have named?

Ans. Yes, sir; at fourteen cents. I think that was about the highest price, probably, soap was going at; some of it may have been cheaper.

Q. Is there such an article known as English castile soap?

A. No, there is no such soap as that.

Q. Can you tell whether you sold any of that article during the year 1871?

Ans. English soap?

Q. Castile soap.

I could not tell positively without referring to the books.

788 Q. (By M'r Reber.) You say there is no such article as English castile soap?

Ans. No; it is French, Italian, or American. Some people call it English, but it is on account of their monopolizing the trade. It is shipped there, and from there here. It is either French, Italian, or American.

Q. (By M'r Gray.) State whether this article you sold to him is the article known as English castile soap.

Ans. It is the article we should give as English castile soap.

Q. Do you say you are unable to state how it was during the year 1871?

Ans. I have no distinct recollection.

Q. Have not you made an examination of your books?

Ans. Not so far. I have looked over the books hastily and I saw there were charges in 1872.

Q. Do you say all you sold him was at fourteen cents a pound?

Ans. So far as I noticed; that was during 1872.

Q. Do you know how the price of this article was during the year 1871?

789 Ans. It was about the same price; it did not vary much.

Q. State whether you have at any time since November 9th, 1870, sold D'r McLean any podophyllin.

Ans. No, sir.

Q. Or alcohol with podophylline in it?

Ans. No, sir.

Q. Do you know the article?

Ans. Yes, sir.

Q. Do you know what the price was here, the market price here, during the latter part of 1870 and 1871?

Ans. I know, but it is one of those articles sold at a discount. It is lessthan forty per cent. discount, if you get Tilden's goods. I could not tellthe price.

Q. Powdered blackroot?

Ans. No; we did not sell any.

Q. Aloes?

Ans. Yes, sir.

Q. At what time?

Ans. Aloes all along through the year 1872. I noticed at twenty cents a pound powdered Cape aloes.

Q. How was the price during the year 1871?

790 Ans. During the year 1871, I think, perhaps it was a little bit higher.

Q. Do you know whether you sold him any, and at what price, during the year 1871?

Ans. I have no distinct recollection about 1871 at all.

Q. You were in business during 1871?

Ans. Yes, sir. I think he bought some of us, but not having noticed the books I could not tell.

Q. By examination you could tell?

Ans. Yes, sir.

Q. Powdered gamboge, state whether you sold him any of that article.

Ans. Yes, sir.

Q. At what price?

Ans. $1.00.

Q. At what time or times?

Ans. Right-along; I remember that was about the same price during 1871 and 1872, $1.00 and $1.10 a pound.

Q. That is the powdered article?

Ans. Yes, sir.

Q. Do you know whether you sold him that article in the latter part of 1870? Have you any recollection whether you sold it to him?

791 Ans. No; it is not likely; that was the time we quit business.

Q. Do you say the price ranged about the same in 1871 and 1872?

Ans. Yes, sir; from $1.00 to $1.10. All I saw charged was charged at a dollar.

Q. State whether you sold him calomel in 1870 or 1872.

Ans. Yes, sir; we sold him calomel.

Q. At what prices?

Ans. $1.35.

Q. (By M'r Reber.) What year?

Ans. 1872.

Q. (By M'r Gray.) Did you sell him any in 1871?

Ans. Yes. I don't remember the exact price. My recollection of it now, it was a little bit lower in 1871 than in 1872.

Q. Did you sell him cayenne pepper?

Ans. Yes, sir.

Q. At what time?

Ans. I see that billed in 1872, at thirty-five and forty cents.

Q. A pound?

Ans. Yes, sir.

Q. Do you know whether you sold it in 1871?

792 Ans. Yes, sir; the price was about the same. There have been no fluctuations in that article.

Q. Could you by examining your books ascertain at what prices you sold this article in 1871?

Ans. Yes, sir. The prices I give are the prices for 1872 taken from the books.

Q. State whether you sold them any of these articles during the year 1873.

Ans. Yes, sir.

Q. Or up in June, 1874?

Ans. Yes.

Q. At what price?

(Counsel for respondent objected to the question as incompetent.)

Q. At what price?

Ans. The prices for 1873 are about a duplicate for 1872.

Q. You mean the same thing over again?

Ans. Yes, sir.

Q. You mean that to apply to all the articles you have named?

Ans. Yes, sir. There may be a slight variation in it.

Q. In reference to calomel, for instance, was there any difference in 1873?

793 Ans. I don't remember. Calomel has only taken a great advance in 1874.

Q. During 1873 it was the same as 1872?

Ans. Yes, sir.

Q. At what time in 1874 did it advance, and what was it?

Ans. It has been advancing since February and March, and I find we have charged D'r McLean this year for calomel $1.85.

Q. During 1872 you sold at what?

Ans. $1.35.

Q. Up to about what date?

Ans. About January 1st, 1874. I will modify. I think that calomel commenced to advance about December, 1873. It advanced about ten cents a pound. I remember the circumstance very well.

Q. Has there been any change in the other articles?

Ans. No, sir.

Q. The price remained the same?

Ans. Yes, sir.

Q. Do you state the price for 1874?

Ans. Yes, sir. We have been charging the doctor twelve and a half cents for soap, aloes nineteen cents, cayenne pepper forty cents, and powdered gamboge eighty cents. That is some reduction
794 from the other prices, except the calomel, which is higher.

Q. Have you sold during any of the time blackroot?

Ans. No, sir.

Q. Or podophyllin?

Ans. No, sir; the doctor has not bought that of us.

Q. Do you know the price of these articles during the period you have spoken of?

Ans. No. I don't know the kind of goods he has used, and I could intelligently give the price.

Cross-examination:

Q. (By M'r Reber.) Is there any difference in the quality and price of aloes?

Ans. Yes, sir.

Q. What are the different kinds of aloes?

Ans. Cape aloes and socotrine aloes. Cape is twenty, and socotrine is worth sixty cents to a dollar.

Q. What did you sell to the doctor?

Ans. Powdered Cape aloes.

Q. Do you know whether he used socotrine in his business?

Ans. I do not.

795 Q. In regard to the quality and price of so called English castile soap, is there any difference in that?

Ans. No; ordinary soap, what we call the imported, we give it for the English, or any other soap is the French castile or Marseilles; then there is the white castile, which is only used for toilet purposes.

Q. So there is no difference in the price of that article?

Ans. No, sir; there is no difference.

Q. In 1870 and 1871 was not castile soap worth twenty five cents a pound?

Ans. I don't remember about that. There was one time when castile soap was very high. I forget when that was.

Q. During the period I speak of, don't you remember that the prices ranged from twenty-two to twenty-five cents?

Ans. I have no distinct recollection on that.

Q. But you have a recollection that prior to 1872 it was higher?

Ans. Yes; I have something in my mind, since you spoke of it, that there was a little while soap was very high.

796 Q. As to the price of calomel, you made sales at $1.35 during the year 1872; was there any fluctuation in the price of calomel?

Ans. Very little. I don't remember any.

Q. You don't remember any fluctuation?

Ans. No, sir.

Q. You don't remember it went up to $1.50 during that year 1872?

Ans. No; it may have been up to that, but I have no recollection of it.

Q. Did you sell calomel to D'r McLean before 1872, between 1870 and 1872?

Ans. Yes, sir; I think so.

Q. And you say that was sold at the same price?

Ans. About the same, as far as I can remember. It may have been a little more or a little less. I have not examined any books to see.

Q. Did you examine your books during the year 1873, to see at what prices you have sold?

Ans. Yes, sir.

Q. What kind of calomel did you sell, English or American?

Ans. American.

Q. Which is the more costly, English or American?

797 Ans. The English costs the most money.

Q. Did you sell him large quantities or small quantities?

Ans. Large quantities.

Q. Do you know whether he was buying of other parties at the same time he bought of you?

Ans. I don't know. I suppose he was.

Q. Do you know whether he used American calomel exclusively in making the pills?

Ans. No; I don't know what he used it for, or what he used, except what I sold him.

Q. What is the difference in the price of English and American calomel?

Ans. There is about fifty cents difference in the pound.

Q. Cayenne pepper, is there a difference in the price and quality of that article?

Ans. Yes, sir; that is all owing to the purity or impurity of Cayenne pepper.

Q. By what name are the different peppers distinguished?

798 Ans. There is Cayenne pepper, African, and Cayenne pepper, American, but the American pepper has gone out of date, has not been used for many years, so it is reduced to African.

Q. The best quality of Cayenne pepper you say could be bought at thirty-five or forty cents?

Ans. Yes, sir.

Q. During what year do you speak of?

Ans. During all through these different years.

Q. 1872 and 1873?

Ans. Yes, sir; it has been a little higher in the spring of 1874 than it has been for years, and so we charged him forty cents then, when we harged him previously thirty-five.

Q. You quit business in 1870 for a while?

Ans. Yes, sir.

Q. When did you resume business?

Ans. In January, 1871.

Q. You quit when?

Ans. In October, 1870. I commenced in January, 1871, again.

Re-examination:

Q. (By M'r Gray.) You say, in reference to Cayenne pepper, early in 1874 you sold it at forty cents?

799 Ans. Yes, sir.

Q. And before that it was thirty-five. How far back?

Ans. All the way back to 1871 it run at thirty-five cents.

Q. In what quantities?

Ans. Five and ten pound lots.

Q. And what quantities did you sell of the aloes?

Ans. Twenty-five and fifty pounds along.

Q. And the calomel?

Ans. In lots usually of twenty-five pounds.

Q. (By M'r Reber.) These purchases made by the doctor were made for cash, and not in his medicines?

Ans. Yes, sir; made for cash. Regular purchases.

A. A. MELLIER, being duly sworn as a witness on the part of the complainant, testified as follows:

Q. (By M'r Gray.) State your business.

Ans. I am a wholesale druggist.

Q. In S't Louis?

Ans. Yes, sir.

800 Q. And for how long a time?

Ans. I have been a partner and proprietor since 1857; previous to that I was some seven, or eight, or nine years a salesman.

Q. State whether you or your house have sold, since November 9th, 1870, castile soap to D'r McLean?

Ans. Well, gentlemen, I naturally overheard the testimony of M'r Webber, and I suppose what I say would almost be a repetition of what he has stated here. You are well aware that D'r McLean sells several proprietary goods, of which we are all large consumers. We have monthly accounts, and have had them so far back I hardly know where to begin. We have at times always sold him those goods you mention at the lowest market price at the time of sale.

Q. Castile soap?

Ans. I presume we have. I presume we have sold him castile soap. I would not like to state the quantity or price without reference to the books, which I have not done. Our accounts with D'r McLean

801 are settled monthly, in which there is a very large balance against us. The amounts he buys of us are small compared with what we buy of him.

Q. Are you able to state what you have sold to him during November and December, 1870, and through the year 1871, and on?

Ans. No. I could send you a written statement, by referring to our books, of these items and the prices at which they were sold. I can give you the average prices.

Q. Are you able to say at what price you sold castile soap?

Ans. I should say from twelve and a half to fourteen cents.

Q. Within what time?

Ans. Starting with November, 1870, to 1872.

Q. Did you sell him what is called podophyllin?

Ans. No.

Q. Blackroot?

Ans. No, sir.

Q. Aloes?

Ans. Yes, sir; he bought the powdered cape aloes, which is the

802 cheapest article of aloes known to the trade. There are three or four kinds of aloes. There are cape aloes, Barbadoes aloes, and Socatrine aloes. They vary from eighteen cents to a dollar.

Q. State what kind you sold, and at what price?

Ans. At that date, I think it was from twenty to twenty-five cents, as near as I can get at it without referring to the particular sales themselves.

Q. You don't give these as actual sales, but merely the average?

Ans. Yes, sir.

Q. In what quantities did you sell soap to him?

Ans. Not very large quantities: a few boxes. The boxes are about thirty-five pounds. I don't suppose the doctor ever sent down for over five boxes at a time that I know of.

Q. Did you examine your books during the year 1873, to see at what prices you have sold?

Ans. Yes, sir.

Q. What kind of calomel did you sell, English or American?

Ans. American.

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Ans. Well, gentlemen, I naturally overheard the testimony of M'r Webber, and I suppose what I say would almost be a repetition of what he has stated here. You are well aware that D'r McLean sells several proprietary goods, of which we are all large consumers. We have monthly accounts, and have had them so far back I hardly know where to begin. We have at times always sold him those goods you mention at the lowest market price at the time of sale.

Q. Castile soap?

Ans. I presume we have. I presume we have sold him castile soap. I would not like to state the quantity or price without reference to the books, which I have not done. Our accounts with D'r McLean

801 are settled monthly, in which there is a very large balance against us. The amounts he buys of us are small compared with what we buy of him.

Q. Are you able to state what you have sold to him during November and December, 1870, and through the year 1871, and on?

Ans. No. I could send you a written statement, by referring to our books, of these items and the prices at which they were sold. I can give you the average prices.

Q. Are you able to say at what price you sold castile soap?

Ans. I should say from twelve and a half to fourteen cents.

Q. Within what time?

Ans. Starting with November, 1870, to 1872.

Q. Did you sell him what is called podophyllin?

Ans. No.

Q. Blackroot?

Ans. No, sir.

Q. Aloes?

Ans. Yes, sir; he bought the powdered cape aloes, which is the

802 cheapest article of aloes known to the trade. There are three or four kinds of aloes. There are cape aloes, Barbadoes aloes, and Socatrine aloes. They vary from eighteen cents to a dollar.

Q. State what kind you sold, and at what price?

Ans. At that date, I think it was from twenty to twenty-five cents, as near as I can get at it without referring to the particular sales themselves.

Q. You don't give these as actual sales, but merely the average?

Ans. Yes, sir.

Q. In what quantities did you sell soap to him?

Ans. Not very large quantities: a few boxes. The boxes are about thirty-five pounds. I don't suppose the doctor ever sent down for over five boxes at a time that I know of.

Q. You have stated the quantities of soap; now state the quantities of aloes he bought?

Ans. I think they would generally buy from twenty-five to fifty pounds at a time.

Q. How often?

803 Ans. I could not tell. I could give you all this information from my books. We have sold these articles constantly to D'r McLean, probably every month.

(Cross-examination declined.)

JACOB MERRCEL, being duly sworn, testified as follows:

Q. (By M'r Gray). State what your business is.

Ans. Drug business.

Q. Where?

Ans. In S't Louis.

Q. And for how long?

Ans. I have been in this city in the drug business going on twenty-two years.

Q. Do you know D'r McLean?

Ans. Yes, sir.

Q. State whether you have sold to him an article known as podophyllin or podophyllum.

Ans. Podophyllum is the root, podophyllin is the resin, and from the root.

Q. Have you sold either of these articles to D'r McLean?

Ans. I have sold the extract of podophyllum, powdered podophyllum.

804 Q. When?

Ans. The first I sold him was about nineteen years ago, say in 1855, that I recollect of.

Q. Do you know what uses he puts it to?

Ans. I understood from him it was for his pills.

Q. Universal Pills?

Ans. Yes, sir.

Q. Which article was that?

Ans. I sold him bark, both'e extract and the root. Podophyllin is the extract of the mandrake.

Q. Is there such a thing as alcoholic extract, with podophyllin in it?

Ans. I never have sold him any that is called alcoholic extract of podophyllum.

Q. What have you sold?

Ans. What is called the extract of podophyllum. It is not an alcoholic extract. It is, properly speaking, a residuary extract, with most of the podophyllin taken out of it.

Q. You have stated two kinds you sold him.

805 Ans. It is what we call common extract of podophyllum.

Q. Have you sold any of that article since the 9th of November, 1870?

Ans. I think not.

Q. Do you know what the value of it was in this market since November 9th, 1870?

Ans. Is it manufactured very largely. The price varies from fifty to sixty cents on large quantities. It is sold by the pound.

Q. The common extract?

Ans. Yes.

Q. What kind was it you sold to him formerly?
(Counsel for respondent objected.)
Ans. The same article, common extract of podophyllum.
Q. Which he told you he used in making his pills?
Ans. Yes.
Q. What is the price of that article since Nov. 9th?
Ans. From fifty to sixty cents. I have sold none lower than fifty and none higher than sixty. I have sold many hundred pounds to pill
806 men, and have sold at none less than fifty and none higher than sixty.
Do you know such an article as powdered black-root?
Ans. Yes, sir.
Q. How is that sold?
Ans. By the pound; in quantities we would sell to D'r McLean, or proprietary pill men, the price would average about twenty-three cents a pound.
Q. Covering what time?
Ans. In the last three years.
Q. Have you sold any of that article to D'r McLean?
Ans. I don't recollect. I don't think I have sold him any in the last few years. I am not quite settled. I don't think I have.
Q. Have you sold him any aloes?
Ans. Not for several years.
Q. Gamboge?
Ans. Not for several years, during the time you refer to.
Q. Calomel, since November 9th?
Ans. I don't think I have. I don't recollect.
Q. Cayenne pepper?
Ans. I don't think I have. He has bought but very little of me the last few years.
807 Q. Castile soap; do you think you have sold him any?
Ans. I think not.
Q. Did you ever make pills for D'r McLean?
Ans. I made a mass ready to roll out.
Q. To what purpose did he put the mass?
Ans. He said it was for his Universal Pills—his vegetable pills.
Q. What were the materials you used in making this mass?
The MASTER. Was it in the last four years?
Ans. No; the first batch I made for him was in 1854.
(Counsel for respondent objected to the witness being inquired of as to what was done before 1870.)
Q. Are you a manufacturer of pills?
Ans. Yes, sir.
Q. Have you been since the 9th of November, 1870?
Ans. Yes.
Q. In what way do you put them up; in small boxes, in quantities of a gross?
808 Ans. Yes, sir.
Q. Do you know what the labor costs; the labor in making a gross of pills?
Ans. I would hate to give the figures on that point now.
Q. You have not made an examination of that?
Ans. I have had it figured up. In making the cost of a gross of pills I get at all the items of cost and labor.

Cross-examination:

Q. When was it you say you sold D'r McLean the extract of podophyllum?

Ans. I have sold it several years, commencing with 1855.

Q. Not since 1870?

Ans. I think not. I don't recollect selling him any since 1870.

At this point the further hearing of the case was adjourned until October 19th, at two o'clock p. m.

ST LOUIS, *October 19th*, 1874.

Pursuant to adjournment, the hearing of the case was resumed as follows:

809 A. A. MELLIER recalled:

Q. (By M'r Gray.) You have made an examination since you were here?

Ans. Yes, sir; upon the points you gave me.

Q. I will ask, then, for you to state whether at any time after the 9th of November, 1870, you sold D'r McLean castile soap?

Ans. Yes, sir.

Q. Will you state the dates, quantities, and price per pound?

Ans. I will state to the master that there was one book in which there were two months, November and December, 1870, one of our city books, which I have not been able to find. I have dated everything from January 24th, 1871.

Q. Do you find you sold him castile soap at that date, or subsequently?

Ans. (Producing paper.) February 2nd, one box castile soap, fourteen cents; 11th, one box, thirteen and a half cents; May 5th, 1871, sixteen cents; June 21st, sixteen cents.

Q. Can you state the quantities?

810 Ans. Yes, sir; I have it written down; and I propose submitting the statement of these articles; I am testifying from that, and that is a copy. I could not, when you asked me the question the other day, recollect the prices, quantities, or amounts, so I took this from our books.

Q. Can you state whether those are the prices at which they were sold?

Ans. This is a transcript of the books.

Q. Do you know the sales were actually made?

Ans. Yes, sir.

Q. And in the quantities there stated, and at the prices?

Ans. Yes, sir; these goods were sold to him at different times, and according to the price at the time. D'r McLean would send round and find out where he could buy the goods at the lowest figure, and if we happened to hit him he would buy.

Q. (By M'r Reber.) You know in point of fact these sales were made?

Ans. I have every reason to suppose these sales were made.

811 Q. (By M'r Stratton.) From the mere fact of seeing them on the books?

Ans. That is the only reason I have; for I have not been there once in ten times when the goods were delivered. I think they are correct, from the running account with D'r McLean. When you asked me the questions, the other day, I wanted to answer them fairly, and I thought the only way was to refer to my books, and I have copied the accounts accordingly.

Q. (By M'r Gray.) Are you able to state, from your knowledge of your business, whether these articles were sold at these prices to D'r McLean?

Ans. Yes, sir. I would swear to it.

Q. I have asked you in reference to castile soap. I ask you if you sold him aloes at any time after November 9th, 1870?

Ans. Yes, sir.

Q. At what date, and at what prices?

Ans. Powdered Cape aloes, January 24th, 1871, 25 cents a pound; January 28th, 25 cents.

Q. State the quantity.

812 Ans. Generally a small quantity; twelve pounds. I see another place charged at 35 cents. There had been an advance. In January they were 25 cents, and in May, 35 cents.

(Counsel for defendant objected.)

Q. I will ask you whether, from your knowledge of your own business, you know these sales were made to D'r McLean, and at the prices and in the quantities you have there?

Ans. Yes, sir. I would not present this account unless I thought it was correct.

Q. Were you acquainted with the market-prices at that time?

Ans. Yes, sir; I was.

Q. You were here to the 26th of May, 1872?

Ans. Yes, sir.

(The master rules that the witness in his testimony is to be confined to facts within his own knowledge, and he may use this paper or any paper to refresh his knowledge and make that knowledge accurate.)

Q. I will ask you if you yourself made any sales to D'r McLean,

813 or sales were made in your house of which you had actual knowledge?

Ans. I have been in the office when D'r McLean's buyer would come in and buy the goods, and the prices were agreed on according to the prices there stated.

Q. Can you identify these and state which they are?

Ans. I don't know that I could identify any particular sale, but from my own knowledge I am satisfied I would not hand in any statement unless it was correct in quantities and prices. It would be hard for me to distinguish one parcel of these goods. D'r McLean never came himself; his buyer would come in and he would buy of my salesman. I would see the goods delivered, bill charged, and settled for.

Q. Do you know at what prices these sales were made? I speak of the occasion where the clerk of D'r McLean came in and made the purchases.

Ans. No; I could not single them out in this long statement. It would be impossible for me to do it.

814 Q. I will ask you this: whether you can state the market-prices of such aloes as were sold to D'r McLean *were* during the year 1871, and up to the time you went to Europe?

Ans. Aloes were about 25 cents a pound to 35 cents.

Q. Soap?

Ans. Soap was from 13½ to 16 cents.

Q. Did you sell him calomel after the 9th of November, 1870?

Ans. Yes, sir.

Q. At what prices, if you know?

Ans. From $1.10.

Q. (By M'r Reber.) Have you a recollection independent of that paper?

Ans. Yes, sir. I am merely referring so as to come in the bounds of this statement; within the bounds of this statement I should say from $1.10 to $1.35.

Q. (By M'r Gray.) Between what dates?

Ans. That would be in 1871 and 1872. I don't go beyond.

Q. Did you sell him gamboge?

Ans. Yes, sir.

Q. Cayenne pepper?

Ans. Yes, sir.

815 Q. After the 9th of November, 1870?

Ans. Yes, sir.

Q. At what price?

Ans. Gamboge, from $1.10 to $1.50.

Q. And between what dates?

Ans. 1871 and 1872.

Q. Cayenne pepper?

Ans. 30 to 40 cents, an average.

Q. Did you sell him such an article as blackroot?

Ans. No; he never bought any of it.

Q. Did you deal in blackroot?

Ans. Only in a very small way; ours was not a house to buy such an article of.

(Cross examination declined.)

JAMES RICHARDSON, being duly sworn as a witness on the part of the plaintiff, testified as follows:

Q. (By M'r Gray.) What is your business?

Ans. Druggist.

Q. Where?

Ans. 704, '6, '8, and '10 North Main street, S't Louis.

816 Q. How long have you been in business in S't Louis?

Ans. I have been there sixteen years.

Q. State whether you at any time from 9th November, 1870, sold castile soap to D'r McLean.

M'r STRATTON. State of your personal knowledge.

Ans. Your way of asking questions here is simply beyond the comprehension of a business man. I don't do the selling of my goods, as M'r Melleir has said so with myself. I do a large business, and employ a large number of men, and *such* one has his particular business to perform. I find in my books two sales to D'r McLean only. These were sales of calomel. I have no personal knowledge of it at all. I know they were charged to him, sold to him, and he paid for them. I don't know about the technicalities of law, but he would not have paid for them if he had not got them. I have a memorandum of them June 1st, 1871, $1.20; March 25th, 1872, $1.36.

817 (Defendant's counsel objected to the foregoing testimony as incompetent, and the master sustained the objection.)

Q. Do you know the price of calomel in S't Louis at these dates?

Ans. We make our sales at the market price. 1st of June, 1871, $1.20; March 25th, 1872, at $1.36. Calomel changes in price with the change of mercury. You may not know there was a corner in mercury: the Rothchilds cornered it.

Q. You say the sales of calomel were the only sales you made to him at that time?

Ans. Yes.
(Cross examination declined.)

CHRISTIAN F. G. MEYER, being duly sworn as a witness on the part of the complainant, testified as follows:

Q. (By M'r Gray.) State what your business is.
Ans. I am in the wholesale drug business.
Q. What house?
Ans. Meyer Bro's & Co.
Q. Doing business in S't Louis?
818 A. Yes, sir; on Second street.
Q. How long a time?
Ans. Since September, 1865.
Q. Do you know D'r McLean?
A. Yes.
Q. State whether your house has sold castile soap to D'r McLean at any time since November 9th, 1870.
Q. (By M'r Stratton.) I will ask you to state of your own knowledge.
Ans. From my own knowledge, I don't remember that I have. I have no definite recollection. We have sold D'r McLean goods from time to time, but if asked to state without reference to the books, I could not state.
Q. (By M'r Gray.) By referring to your books, could you refresh your memory so that you would know you did make any sales to him?
Ans. I don't think I remember as to castile soap.
Q. Did you make any sale to him of blackroot?
Ans. No; I think not.
Q. Of aloes?
Ans. I think not.
819 Q. Of gamboge?
Ans. I think we did.
Q. At what time?
Ans. I could not give any definite evidence as far back as that. I would not remember whether six months or twelve months ago. I know it has been from time to time. If I saw it on the books I should have no hesitation to believe such was the fact; but whether my recollection would go to that particular case, I don't know; I could convince myself.
Q. (By M'r Stratton.) You may not have sold it yourself?
Ans. No; I have from time to time sold to the man that D'r McLean sent there.
Q. Can you tell what those sales were where you made the sales yourself?
Ans. No; I could not now.
Q. Could you by referring to your books?
Ans. It would be a good deal of trouble, even if I made certain
820 sales; I did not enter them; I simply say to the man to enter them and see to the delivery of them. That in most cases has been my way of doing; so probably there is not an entry on the books in my handwriting goods sold to D'r McLean.
Q. Do you know of any sales appearing on the books, whether he paid for the bills or not?
Ans. Yes; I am satisfied, as sundry times goods have been delivered to D'r McLean or his representatives, and that they were of course paid for.
Q. (By M'r Reber.) Do you know that personally?

Ans. Yes, sir.

Q. (By M'r Gray.) Know they are paid for?

Ans. Yes, sir.

Q. Can you tell us what these sales were that were paid for?

Ans. I looked over the books and saw some entries. I was informed certain questions would be put to me, and I satisfied myself.

Q. If you had made the sales yourself you could not tell the items?

821 Ans. I made sales in 1872; some few items I put down.

Q. (By M'r Reber.) That you know of personally?

Ans. I am satisfied of personally.

Q. (By M'r Gray.) I will ask you whether you know that the goods you found charged on your books as sold to D'r McLean were paid for by him?

Ans. That I am satisfied of, because every beginning of the month he *he* brings in his settlement, as we bought goods of him, and what we bought of him is deducted and the balance is paid; many of these settlements I made myself.

Q. Will you look at your memorandum?

Ans. These memorandums are simply references to certain sales taken from our books.

Q. Do you know whether any of these sales were settled for by D'r McLean?

Ans. They have all been settled by D'r McLean or his clerk, M'r Taylor, in the name of D'r McLean.

822 State what the articles were, and the dates, amounts, and prices?

Ans. January 19th, 1871, 12 pounds of powdered cape aloes, at 25 cents; 20th of the same month and year, 25 pounds of calomel, at $1.40 per pound; February 19th, same year, 25 pounds of calomel, at $1.40; same time, 12 pounds of powdered cape aloes, 25 cents; 8 pounds of powdered gamboge, $1.20, and two pounds of powdered cayenne, at forty.

Q. Forty cents a pound?

Ans. Yes, sir; May 27th, 1871, 25 pounds of calomel, $1.30.

Q. (By M'r Stratton.) Are these the settlements you made yourself?

Ans. I don't know; I am satisfied they are settled.

Q. (By M'r Gray.) Do you know these sales you have spoken of have been included in the settlement with D'r McLean?

Ans. That I know as a business man; that we do business that way.

Q. If you know the market price at the dates you have given of these articles in the market, you may state whether these were the

823 market prices at these dates.

Ans. These were the market prices at these dates.

Q. Did you sell any other articles to D'r McLean? Did you sell blackroot?

Ans. I think not.

Adjourned to Wednesday at ten o'clock.

S'T LOUIS, *Oct. 21st*, 1874.

Pursuant to adjournment the hearing of the case was resumed, as follows:

ENNO SANDERS, being duly sworn as a witness on the part of the complainant, testified as follows:

Q. (By M'r Gray.) What is your business?

Ans. At present it is manufacturing mineral waters.

Q. What business were you in in the year 1870, 1871, and 1872?

Ans. I was in the manufacture of chemical extracts, medicines, medicinal preparations up to the first of April, 1872.

824 Q. Do you know such an article as podophyllum?

Ans. Yes, sir.

Q. State whether you sold that article to D'r James H. McLean at any time?

Ans. I manufactured for D'r McLean an extract of podophyllum. I can't positively tell when I commenced, but some month in 1868 or 1869; I manufactured it every year.

Q. Did you sell that article to the doctor?

Ans. Yes, sir.

Q. In the latter part of 1870 and 1871?

Ans. I believe I did sell in the latter part of 1870 and during the year 1871. I can't fix the date.

Q. You say you can't fix the date?

Ans. I can't positively fix the date.

Q. Do you say it was the latter part of 1870 and 1871?

Ans. I am positive I sold him in 1870, the latter part of 1870, and the year 1871.

Q. I mean in the latter part of 1870 and 1871. I don't mean the days.

Ans. I sold him to my recollection.

Q. What is the article you sold?

Ans. Watery extract of podophyllum.

825 Q. (By M'r Stratton.) What do you mean by the latter part, prior to the 9th of November or subsequent to the 9th of November, 1870?

Ans. I can't say whether it was the latter part or subsequent. It was the latter part of 1870.

(Counsel for respondent objected.)

Q. (By M'r Gray.) You have sold the latter part of 1870 and 1871, but you cannot fix the exact date?

Ans. Yes, sir.

Q. At what price did you sell?

Ans. At sixty-five cents a pound.

Q. Were you acquainted with the market value of that article during the year 1872?

Ans. I believe I fixed the price for once. I cannot tell whether it has been sold cheaper afterwards. There was absolutely no certain market value of it, because it was manufactured for the doctor expressly. I did not manufacture it for any one else. We agreed on a certain price when I managed the factory, and that was 65 cents.

826 Q. You left that factory at a certain date?

Ans. Yes, sir.

Q. Do you know after that?

Ans. Not of my own knowledge. If I know anything I only know by hearsay.

Q. Do you know whether the price after was more or less?

Ans. I think so.

Q. (By M'r Stratton.) You think so?

Ans. How can I know? I have not seen the books, and therefore I can't swear I know it of my own knowledge.

Q. (By M'r Gray.) Do you know to what purpose D'r McLean put the extract you sold him?

Ans. Yes, sir: for manufacturing pills.

Q. What pills?

Ans. The pills he manufactured, purgative pills.

Q. Do you know whether it was the pills he called Universal Pills?

Ans. I expect that is the only pills besides the febrifuge he makes.

Q. Is there any other form of podophyllum than this extract you sold him?

827 Ans. I sold him podophyllum, but I know he did not use that for that purpose; I have that from his own statement that he that extract for his pills.

Q. The watery extract?

Ans. Yes, sir.

Q. Is there such an article as alcoholic extract of podophyllum?

Ans. Yes, sir.

Q. Did you make that kind?

Ans. I used to make it.

Q. What was that worth per pound?

Ans. Six or eight dollars, I think. I may have sold it as high as ten dollars in the commencement; I do not know.

Q. Did you ever sell the doctor any of that kind?

Ans. I do not remember; I think not; may be I sold him some in the commencement, but I scarcely think I have; I do not know.

Q. You say seven or eight dollars a pound?

828 Ans. Yes, sir; I have not examined the price-list of that at any time, but that is my impression that *is my impression* that is about the price.

Q. Name the extract.

Ans. Alcoholic extract of podophyllum. There is a difference between the alcoholic extract and the watery extract.

Q. Have you ever manufactured pills yourself?

Ans. I have made a great many pills myself in my life.

Q. You were in the drug business; a prescription drug store?

Ans. Yes, sir; I made pills in quantity.

Q. For how many years?

Ans. I went in business in 1853.

Q. Do you know about coating pills?

Ans. Yes, sir; there are different kinds of coating.

(The witness was here shown pill-box marked "K" in red ink.)

Q. I ask you to examine the pills in that box and state whether they are what are called coated pills; whether they are coated.

829 Ans. The druggist would not call them coated pills; they seem to be perfectly uniform their make; I think the druggist and apothecary would not call that a coated pill; just a natural pill rolled out, and some absorbent powder used to prevent them from sticking together.

Cross-examination:

Q. (By M'r Stratton.) I will ask you, doctor, if that is not a coated pill. Look at it again.

Ans. I don't see that there is a separate coating except the powder that may have adhered to it. I take it, a pill is coated such as has a different material around it, that encloses it; for instance, sugar-coated, or coated with balsam of tolu, or any other article that may be different from the substance of the pill. I can't perceive that there is any difference in that margin, that there is anything on the outside of the pill that encloses it, and that we call usually a coated pill.

JACOB S. MERRILL recalled.

Examined by M'r Gray:

You have been a pill-maker?

Ans. Yes, sir.

830 Q. How extensively? How long?

Ans. I have been making pills for over twenty-five years, and I suppose I have made for the last fifteen years—I suppose I have averaged over five hundred pounds a year.

Q. Do you have coated pills?

Ans. Yes, sir.

Q. What do you understand by coating a pill?

Ans. My understanding of a coated pill is covering it with a substance which makes it look better and taste less.

Q. Look at the pills in box marked in red ink "K," which you will see by looking at the back of it there. (Referring to a drawer.) Look at the pills in that box and state what you think as to their being coated.

Ans. I should not call that a coated pill in the ordinary term of coated pills. That pill has been rolled—been covered with gelatine. It has been covered with gelatine and rolled in starch of some form or
831 other; some kind of starch, I thought at first, when I first saw the pill it was, but I see it is just moisture. I find upon feeling it there is gelatine there which causes the starch to adhere to it.

Q. Well, then, what do you say as to its being a coated pill? Is that a coated pill in the accepted sense of the term?

Ans. It is not called a coated pill in the accepted sense of the term; there are four or five sorts of pills; there is gelatine-coated pills, which are very smooth; there is a separate coat of gelatine; it is a separate body that will peel right off of it.

Q. Is that pill so?

Ans. No, sir; then there is a coat over that gelatine, and that is what is called the ordinary coated pills. Sugar-pills which are sold in the market, that is coated in the same way that this has been. They commence usually first with gelatine, in some form of gelatine, or glue, & then with sugar, which makes it a permanent white, hard-coated;
832 it is a separate coat usually adding about one-third to the weight of the pill when it is finished. Those are what are so extensively sold in the trade as sugar-coated pills; generally adds about one-third to the weight of it.

Q. Did you ever coat pills yourself?

Ans. Yes, sir; I have done it for many years.

Q. In what way have you coated them?

Ans. I have coated them, you might say, an hundred ways: almost all ways; I never saw them this way.

Q. What would be the expense of coating in that way with gelatine as you say: that is a gross?

Ans. Well, there is different kinds of starch: there is quite a margin in the different kinds of what is known as starch; there would not be a difference of more than two cents a gross on the cost of coating the pills; there is corn-starch, wheat-starch, or potato-starch.

Q. Give us your judgment as to what the expense would be per gross.

833 Ans. About 30c. a gross; of course the estimates are a little indefinite; my figures are based on five boxes to the ounce. I count the price of coating 15c. a pound for this kind, for gelatine and starch.

Q. Fifteen cents for the material or for the pills after they are made?

Ans. For the pound of pills.

Q. If it would vary at all from this, what amount of variation would it be? Would it be above or below that?

Ans. It would be below that. I call it 30c. for 160 boxes, & there is only 144 in the gross. I will state that I have coated pills that looked like that (referring to a pill); I have taken the pill when it was in the condition of that, that is when I had it wet a moment ago, & let a small current of steam just strike the pill. I would do it this way: I would take a large screen with pills two inches deep, hold it over the jet of steam, & throw it right into the revolving mill with starch in it; the pill when it comes from the jet of steam would look like that,

834 and rolling it a moment in the starch, it would be as white as any of the rest of them, that is, perfectly white; there is a pill now perfectly white, but it don't stay on so well in this way without using a little mucilage.

Q. You think you would discover there a coating of gelatine?

Ans. Yes, sir; I have coated pills in that way within the last week.

Q. You put the expense of that per gross not to exceed 30 cents?

Ans. Yes, sir.

Q. You fix it at 30 cents for the 160 boxes?

Ans. Of course it is a little indefinite as to the exact quantity of pills to the pound, counting five boxes to the ounce; I have stated further the term coated pills is what is known in the trade and what is sold so extensively as sugar-coated pills; the coating of that class of pills, it costs about 30c. a pound, that is for the best quality of coating. That is what we pay for having it done; I cannot do it nice enough myself, and I hire for it.

Q. That 30c. would be for pills after they are made?

835 Ans. Yes, sir; and that would be so much per gross, which would make 60c. for a gross; that is the highest price that I know of any person charging for it—the finest quality of pills. The pills coated in that way are as handsome as you find any sugar drops in the confectionery stores, a handsome, polished, smooth surface.

Cross-examination by M'r Stratton:

I will ask you if you have not paid as high as 65c. during that time, from 1870 to 1871, for coating?

Ans. No, sir; I think I never paid as much as that; the highest I ever paid was 50c. for polished pills.

Q. Fifty cents a pound?

Ans. 50c. a pound; but that was some years ago, some little batches, no large batches; it was merely experimental.

Q. That would about a dollar a gross?

Ans. Yes, sir; that was not in large quantities. I will state, in small quantities it was an experiment; not my regular quantities of pills.

836 The MASTER. Defendant here presents an amended statement of his account duly sworn to, and asks that it may be filed.

M'r GRAY. On behalf of the complainant, subject to the filing: first, because the decree required the defendant to file an account when asked for, and our account was asked for before the examination commenced, and was filed. The account that the decree contemplated was filed before the case began. I object to this account as not being the account called for by the decree, but a voluntary one made out by the defendant after a large mass of testimony was taken. I object to it on account

of the time at which it was presented, after testimony was mostly taken. And, further, that pretty much all the items are estimates and not actual figures: and, further, because it falsifies the account filed in accordance with the decree. Further, instead of giving actual sales & figures it gives estimates and arbitrary apportionments.

837 The MASTER. In relation to the amended account offered to be filed by the defendant, I regard the account as merely of assistance in arriving at the substantial facts in controversy, and that it so far resembles the first account filed that the evidence heretofore offered is *is* relevant thereto, so, without passing on the weight or effect thereof, the plaintiff's objections are overruled and the amended account is allowed to be filed.

Adjourned until Friday, 2 p. m.

OCTOBER 23RD, 1874.

Met pursuant to adjournment.

MARCUS A. WOLFF, being sworn, testified as follows:

Examined by M'r Gray:

Q. What is your business in S't Louis?

Ans. Real estate agent, collector of rents, &c.

Q. For how long a time have you been in that business?

Ans. Between 14 & 15 years.

Q. Is it part of your business to rent property and buildings?

838 Ans. Yes, sir.

Q. Do you know D'r McLean's place of business on Chestnut st.?

Ans. I do.

Q. Do you know the size of the lot, and what buildings he has on it?

Ans. I know the business conducted on it. I don't know the size of the lot, only from eyesight & judgment. I never had any occasion to measure it.

Q. How long have you been renting buildings? As long as you have been in the real-estate business?

Ans. I have.

Q. Are you acquainted with the values of rents in the neighborhood? Where is your office?

Ans. I am on Chestnut street, between Third and Fourth. I don't know the dimensions of D'r McLean's building. I don't know the number of feet front and number of feet depth. I have only judged from the eye in looking at it.

Q. You have seen it?

Ans. I see it every day.

Q. Will you please state whether you are acquainted with the

839 values of property & prices of rent in that neighborhood, & whether you had such knowledge during the year' 1870, 1871, and 1872?

Ans. I believe you, sir.

Q. State, then, what would be a fair rent of the doctor's place. Do you know, in the first place, what part of it he used or has used?

Ans. Well, the building, I think, is about 23 or 25 feet front, looks so to me, by one hundred feet in depth, four stories in the rear and three in front: that is merely from a casual observation I am giving my opinion now.

Q. Do you know whether he occupies the whole building, or did in 1870, 1871, or 1872?

Ans. I believe he did; I don't know that.

Q. Didn't Pitzman, the surveyor, occupy part of it?

Ans. The second story, yes, sir; he is at the present time; he occupies the second story.

Q. What would be a fair rent of the portion occupied by him?

840 Leaving out the second floor, you can get at it in any way you choose, but what I want to get at is what would be a fair rent of that portion which was occupied by the doctor?

Ans. Exclusive of the portion rented to Pitzman, three thousand dollars a year.

Q. Do you speak now of the years 1870, 1871, & 1872; of the three years?

Ans. For the last three or four years, there has not been much change in that locality.

Q. Then, is that your estimate for those years?

Ans. Yes, sir.

Q. Was not the third floor occupied by Clarke, the architect?

Ans. No, sir; he was over O'Bear's office.

Q. Your office is in the Kentucky building?

Ans. Yes, sir.

Q. Do you have the renting of that building, that property?

Ans. I have had for ten or twelve years.

Q. How are those buildings situated?

841 Ans. The Kentucky building is right west of the alley, and the doctor's building right east of the alley.

Q. What is the front of that property; the Kentucky building?

Ans. About 80 feet front.

Q. Three or four tenements in there, are there?

Ans. Yes, sir.

Cross-examination by M'r Reber:

Do you know the property adjoining the doctor's place of business occupied by O'Bear?

Ans. I do, sir.

Q. How does that compare in the dimensions size of Doctor McLean's property?

Ans. I think it has more front: O'Bear's has more front, I think: I never had occasion to measure it: I have an impression that the O'Bear's building is wider than the doctor's: I was under the impression that O'Bear's was 24 feet & the doctor's 22 feet.

Q. In giving these dimensions, you merely give your recollection?

Ans. Merely my idea: I had no idea of testifying here until to-

842 day: I am certain I have not looked at it since I was spoken to about this case.

Q. You took it to be 24 feet front?

Ans. Yes, sir: I know the staircase is taken off the doctor's building, the stairway leading into the two buildings is taken off the doctor's, and that gives it the appearance of being narrower in front than what it is: the stairway leading into Williams' office is taken off from the McLean building.

Q. The stairway from the street?

Ans. Yes, sir; it makes the building occupied by the doctor look narrower than it probably is.

Q. And the body of the building inside?

Ans. Yes, sir.

Q. How many stories high is the O'Bear building?
Ans. Three stories.
Q. How deep?
Ans. Well, I estimate it to be 60 or 65 feet.
Q. Is it as deep as D'r McLean's house?
Ans. I think not, sir.
Q. Do you know what the O'Bear building is rented f r?
843 Ans. Well, the first floor has been rented at $1,800.00.
Q. The entire building, do you know what it rents for?
Ans. I do not, sir.
Q. Did you have the renting of the O'Bear building?
Ans. Only within the last year.
Q. Did you ever collect the rents of it; that is, three or four years ago?
Ans. No, sir; never. I have only had charge of it, I think, about 12 months.
Q. Who occupied the second floor?
Ans. Williams & Tittman.
Q. What rent did they pay?
Ans. I think they paid $1,100.00.
Q. Do you know how long Williams & Tittman had been occupying there?
Ans. I do not.
Q. How long had you known them to be there?
Ans. I think they were the first tenants after it was finished.
Q. How long ago was that?
Ans. Really I don't know. I think it was in 1870, 1869 or 1870, the building was completed.
Q. Was there a third floor in that building?
Ans. Yes, sir.
844 Q. You say the third floor was rented by Clarke, the architect?
Ans. Yes, sir; I think he paid six hundred dollars.
Q. Had you knowledge of the rental value without knowing what they were paying?
Ans. As I remarked, I don't think there has been any change in the street value for the last three or four years.
Q. How high do you say D'r McLean's house was?
Ans. Three stories in front and four in the rear.
Q. So I understood.
Ans. I am only giving my idea about it.
Q. Was Pittzman occupying the second story of D'r McLean's building all the time from 1870 down?
Ans. I don't know.
Q. Do you know who occupied before Pittzman; whether D'r McLean himself occupied it?
Ans. I don't know; I paid no attention to it before it came under my charge.
Q. The part that Pittzman occupied, what was the rent of that?
Ans. $600.00.
845 Q. Your estimate for the entire building would be $3,600.00, would it?
Ans. Yes, sir.
Q. Did you regard the rent of the O'Bear house as high?
Ans. Well——
Q. Why should that be worth more than the McLean building?

Q. Do you know whether he occupies the whole building, or did in 1870, 1871, or 1872?

Ans. I believe he did; I don't know that.

Q. Didn't Pitzman, the surveyor, occupy part of it?

Ans. The second story, yes, sir; he is at the present time; he occupies the second story.

Q. What would be a fair rent of the portion occupied by him?

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Q. Do you speak now of the years 1870, 1871, & 1872; of the three years?

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Q. And the body of the building inside?

Ans. Yes, sir.

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Ans. Three stories.
Q. How deep?
Ans. Well, I estimate it to be 60 or 65 feet.
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Q. Do you know who occupied before Pittzman; whether D'r McLean himself occupied it?
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Q. The part that Pittzman occupied, what was the rent of that?
Ans. $600.00.
845 Q. Your estimate for the entire building would be $3,600.00, would it?
Ans. Yes, sir.
Q. Did you regard the rent of the O'Bear house as high?
Ans. Well——
Q. Why should that be worth more than the McLean building?

Ans. I think it is high. I don't believe it would bring that price at the present time.

Q. Don't you think it would three or four years ago?

Ans. A new building always rents better when it is new than it does after it gets a few years of age on it.

Q. That is the only reason, is it?

Ans. Yes, sir.

Q. Is the McLean building a larger building than the O'Bear building?

Ans. Decidedly a larger building after you get beyond 50 feet in depth, but the back building of a house is of little value in the central part of the city for manufacturing purposes or for anything of that kind.

Q. It depends on the business?

Ans. Yes, sir.

846 Q. You make your estimates of rents upon the basis that the O'Bear building has a larger front to the street than the McLean building?

Ans. Yes, sir; & a more eligibly located office.

Q. The McLean building, is not that on an alley?

Ans. Yes, sir.

Q. And the O'Bear building is an inside building, is it not?

Ans. Yes.

Q. The house on the alley is worth more by its being on the alley?

Ans. I don't think it is. Leffingwell appraised it at the same time. I am on the alley and he is the same.

Q. You think it is worth no more?

Ans. No, sir.

Q. Have you had the renting of the property?

Ans. I rented it before I had charge of the building. I was a tenant before I became agent. I have increased the rent of it myself. I am paying $1,200.00 for my floor. Papin pays a thousand & Leffingwell pays $1,200.00.

Q. Why don't Papin pay the same as the rest?

847 Ans. Leffingwell has a wider office, & Papin's office being the central office is the narrowest.

Q. How much wider?

Ans. Two feet.

Q. And that makes a difference of $1,200.00?

Ans. Yes, sir.

Q. The McLean building is wider than the O'Bear building, it ought to be more rent. It has as much of the street and the stairs there and a larger width back of the stairs?

Ans. It is not as eligibly located office.

Q. Why not?

Ans. I don't think it is so deep; the ceiling is not as high. I have never measured it.

Q. You speak of the location?

Ans. I am speaking of the construction of the two buildings.

Q. Is not McLean's establishment very conveniently constructed?

Ans. Well, I believe it is; I never had occasion to go through it.

Q. (By M'r Gray.) Do you know whether there is access to
848 the McLean building on the alley?

Ans. There is access all along the alley; doors in the building into the alley, doors & windows.

H. R. DRIGGS recalled.

By Mr. Dennison:

You have been sworn, I believe, in this case?

Ans. Yes, sir.

Q. Will you state whether since you last testified here you have made further examination of D'r McLean's books?

Ans. I have.

Q. Upon what point did you make that examination?

Ans. I have forgotten whether I made the examination immediately after.

Q. Upon what point did you make it; upon what matters?

Ans. Upon all matters. I have made it but lately. I don't know whether I have testified since I made the examination. I have examined it in regard to profits & losses.

Q. Have you examined all the accounts contained in his books relating to the business which he carried on there?

849 Ans. I have.

Q. Have you ascertained from that examination what profits it appears from his books have been realized from the medicine business he had been carrying on?

Ans. Yes, sir.

Q. Covering what time have you made such examination?

Ans. From November 9th, 1870, to May 22nd, 1872.

Q. Are you able to state what appeared from his books to have been the profits of that business during that time; &, if so, will you please state?

Ans. The profits in detail or the net profit?

Q. You may state first the net profit.

Ans. The net profit for the whole year 1870 was $66,368.74; the pro rata of that in proportion to the sales from November 9th, 1870, to December 31st, would be $7,996.30. In proportion to the time in 52 days, $9,455.27.

Q. Let me ask you one question there in proportion to the sales; what sales do you refer to?

Ans. In proportion as the whole sales is to the sales from No-
850 vember 9th to December 31st, that is the whole sales for the year.

Q. So the total profits of the year would be to the profits for that period?

Ans. Yes, sir.

Q. The next year?

M'r GRAY. The other proportion is for the proportion of time.

Ans. Yes, sir; the 52 days.

M'r DENISON. State how you make up that proportion.

Ans. As 365 is to 52 days, so is the total profit to the profit of the time.

Q. Well, for the year 1871, what do his books show to have been the profits resulting from his business?

Ans. $68,543.23.

Q. From the beginning of the year 1872 to the 22nd of May, 1872, what from his books appear to have been the profits realized?

Ans. I have found the profits for the whole year was $71,155.07, the pro rata in proportion to the sales as the whole sales of the year
851 to the sales during that time, so is the whole profit to a profit of $29,814.81 in proportion to the time it would be $24,747.57.

Q. State how you make that proportion. How would you state the proportion?

Ans. As 365 days is to 141 days, the time up to May 22nd, so is the whole profit for the year, $71,155.07, to a profit of $24,747.57.

Q. What do you find to be the total amount of sales for the year 1872?

Ans. $205,651.96.

Q. What do you find the amount of sales to be from the beginning of the year 1872 to the 22nd of May, 1872?

Ans. $86,170.59.

Q. I believe you stated the amount of sales, total sales, from the 9th November to the end of the year 1870?

Ans. The total sales from the 9th November to the end of the year is $25,250.99.

Q. What were the total sales for the year 1870?

Ans. $209,581.36.

852 State how you make up the account from D'r McLean's books so as to give the conclusions which you have just stated.

Ans. I found that the merchandise profit for the year 1870 was $135,569.25; from this I took the expenses of this one business, leaving out the Pearl estate and some other things which I found in the profit and loss account, which I shall bring in here. The items of expense are:

Loss on bills receivable	$11,200 00
On receipts receivable	1,819 00
Printing and paper, act. cost	33,974 97
Expenses	18,754 23
Advertising	40 00
Loss on movable stock	1,380 81
Loss on personal a/c	2,031 50
Making a total for the debit of profit and loss	$69,200 51

Which, deducted from the merchandise profit, gives a net profit of $66,368.74.

M'r GRAY. What is the personal account? What does it embrace?

Ans. A loss of individual accounts.

M'r DENISON. Explain that item.

Ans. That item is a loss of individual accounts.

Q. What individual accounts?

853 Ans. Well, the loss on all accounts. For instance, he sells goods to different parties; those parties may fail and lose part of the bill, and this is an aggregate of this list.

Q. You mean that individual account with his business?

Ans. Yes, sir.

Q. You don't mean that it is an account of his personal expenses outside of the business?

Ans. Not all, sir; I don't include that here.

Q. For what year is this statement of expenses just made by you?

Ans. 1870.

Q. In what manner have you made up the account for the other portions of the period?

Ans. The same manner; I have them in detail here.

Q. You may state, then, how you make up this account, and what items enter into it for the year 1871.

Ans. The merchandise profit, $122,384.15; bills receivable, profit, 28,999.62; makes a gross profit of $151,383.77 for 1871.

Q. From this you took the expenses, &c.?

Ans. The loss of bills receivable	$9,022 57
854 Cost of printing & paper	$49,790 80
Expenses	18,734 31

Advertising		65 50
Insurance		55 00
Movable stock loss		3,748 57
Loss on personal account		1,423 79
Making a total debit to profit and loss of		82,840 54

Which, deducted from the gross profit, leaves a net profit of $68,543.23.

M'r DENISON. Does that include all items properly relating, or in anyway relating, to the business?

Ans. I think it does, sir.

Q. As appears from his books?

Ans. Yes, sir.

Q. State how you make up the account, so as to give the net profits during 1872 down to the 22nd of May.

Ans. For the total year merchandise profits		143,451 76
Bills receivable, profit		7,218 11
Making a gross profit of		150,669 87
Deducting from this cost on printing and paper	55,542 09	
Expenses	21,382 96	
Advertising	1,850 25	
Movables	939 50	
Making an aggregate debit of		$79,514 80

Which, deducted from the gross profit, leaves a net profit for the year. 71,155 07

Q. You have already stated, I believe, the pro rata for the period down to the 21st of May?

Ans. Yes, sir.

Q. Will you state now what proportion of that net profit for the year 1872 you have apportioned to the period down to the 21st May, 1872?

Ans. I have proportioned it in proportion to the sales, and also in proportion to the time. In proportion to the sales, it would be, as *to* the whole sales, $205,651.96, is to the sales up to May 22nd, $86,170.59, so is the total net profit of $71,155.07 to a profit of 29,814.81.

Q. What is the pro rata of profit made according to the time?

Ans. As the whole time of the year, 365 days, is to the time up to May 22nd, 141 days, so is the total profit of $71,155.07 to a profit of $24,847.57.

856 Q. In any item of printing and paper, state whether or not you have embraced everything that appears in the printing & paper account.

Ans. Yes, sir.

Q. As shown by the defendant's books?

Ans. Taken from the face of his books.

Q. What have you excluded in this account from the expense account, if anything, as shown by the defendant's books?

Ans. In 1871 his expense account, as shown by the book, is $25,230.13. From this deduct D'r McLean's expenses East 386; water license for residence, 39.60; donation accounts, 588.80; furniture, 5,243.78; carpets, 218.32.

M'r GRAY. Do the books show where that furniture is used?

Ans. Taylor told me it was for his residence. Making a total of $46,475.96, which I have deducted from the amounts shown by his account, leaving $18,754.23.

Q. Why did you exclude the item of furniture ?

857 Ans. The furniture ? I asked Taylor about that, and the book-keeper, and he said all items of furniture was for his residence.

M'r STRATTON. I object to what Taylor said.

(The master sustained the objection.)

M'r DENISON. Take the item excluded from the expense account for 1870, water for residence ; state whether the books state this item in this manner.

Ans. Yes, sir.

Q. State what the books show with regard to the item of carpets.

Ans. It does not show what it is for.

Q. In the same year ?

Ans. It does not show what it is for.

Q. Is there anything on the books informing you as to whether or not these carpets were used in D'r McLean's business ?

A. No, sir.

Q. Is there anything to show whether the item of expenses to California in the account for 1871 was for business expenses ?

Ans. No, sir.

858 Q. Does it appear whose expenses they were ?

Ans. D'r McLean's.

Q. His family ?

Ans. It does not say.

Q. The same year, does the item water for residence so appear on the books ?

Ans. It does.

Q. Donation, does that so appear on the books ?

Ans. Some of them are given in detail—donation account ; some of them are quite long accounts ; some in detail, & some do not say what it is for.

Q. Does it say to whom they were given ?

Ans. No, sir.

Q. Is the same true of the item donation account in the statement for 1870 ?

Ans. Same in 1870.

Q. In the item of furniture, for the year 1871, $1,121.90, state why you excluded that from the expense account which enters into your statement of his business transaction'.

Ans. I will state there is nothing on the books to show what the furniture is used for.

859 Q. Does it describe the furniture ?

Ans. It does not.

Q. For 1872, J. H. McLean's trip to Europe. What information do the books give you in regard to that item, as to its relating to the business of the doctor ?

Ans. None whatever.

Q. St L. B. & L. Library, $175.00. What do the books show in regard to that item ?

Q. The books show that money was paid for that purpose. The entries are about as I have entered.

Q. Life insurance, $322.30. Is there any further explanation of that item on the books ?

Ans. I think some initials are opposite it ; J. H. McL., or something of that kind.

Q. What explanation of the item, pew-rent, $52.00 ?

Ans. Nothing further.

Q. Portrait Richards, $45.00. Is there any explanation of that?

Ans. Nothing further.

Q. Expense to Bank of Commerce, $2,138.10. What explanation of that item?

Ans. I could not understand what that was, sir. There is a
860 credit on the opposite side of the account of about two thousand dollars, which is probably part of that. I have deducted from the total the balance.

Q. Is there any connection between the item, expense to Bank of Commerce and such amount returned by J. H. McLean, as appears from the books?

Ans. None, apparently.

Q. How does this last item appear?

Ans. As cash returned. It does not say what it is for. It appears so much cash returned on the opposite of the expense account.

Q. In making up this total, state whether anything is charged in the merchandise account for stamps used on medicines.

Ans. No, sir.

Q. Is there a separate account for stamps?

Ans. There is.

Q. And you have not taken that into account here in making up this statement?

Ans. No, sir; I have not.

861 Q. Have you taken into account any item of rent of premises?

Ans. I have not.

Q. Why not?

Ans. Nothing on the books to show in regard to that.

Q. Do you find any charge on his books relating to the rent of the building occupied by him for his business purposes?

Ans. I do not.

Q. Are you able to state whether his books show in regard to the stamp-account?

Ans. I can show the aggregate paid for each year. For the year 1870 stamp-account shows a debit balance of $16,505.60; 1871, $13,661.57; 1872, $14,804.45.

Q. That covers the entire amount, as shown by the books, for the three years?

Ans. Yes.

Q. Do the books show what the denomination & quantity of the stamps were?

Ans. The quantity in dollars & cents?

Q. The denomination of the stamp.

Ans. No, sir.

Q. (By M'r Gray.) Whether one cent or two cents or three cents or four cents?

862 Ans. No, sir.

Q. (By M'r Denison.) What description is there in the account of stamps purchased?

Ans. There is no description except in the cash-book, for revenue-stamps, $1,000.00.

Q. Any other description than revenue-stamps?

Ans. No, sir.

Q. How many of each kind?

Ans. No, sir.

Q. The amount is given in totals?

Ans. Yes, sir.

Q. Of the different amounts as they appear to have been purcha. sed?

Ans. Yes, sir.

Q. Have you the items of that account?

Ans. I have not.

Q. Do you remember, from your examination of the books, about what was the amount of each item?

Ans. About a thousand or two thousand dollars, I think.

Q. Do you find any items of expenditures for stamps less than a thousand dollars that you remember of?

863 Ans. I think one thousand dollars is about the amount of all the items that I remember. There may be one or two a little more; I don't recollect of any any loss.

Cross examination:

Q. (By M'r Reber.) In making your deductions for the year 1870, did you deduct for expenses $18,754.23; those are your figures?

Ans. Yes, sir.

Q. What is the amount of the expenses as shown by the books of D'r McLean that year?

Ans. His expense account shows $25,230.13.

Q. You don't, then, make the deduction for the $25,000.00, but only for the $18,000, that year?

Ans. $18,000.00, that year.

Q. In making the deduction in 1872 of the expense account what was the amount that you deducted?

Ans. $21,382.96.

Q. What is the amount of the expense account that year, as shown by the books?

Ans. $25,292.05.

Q. I will go to 1871; you deduct for the expense account, how much?

864 Ans. $18,731.31.

Q. What is the amount of the expense account as shown by the books?

Ans. $23,878.96.

Q. In the expense account of 1870 you made a deduction of traveling expenses of D'r McLean going East, $386.00; is there anything on the books showing that D'r McLean was not traveling on his business?

Ans. No, sir.

Q. You deduct an item of $218.00 for carpet in that same year; is there anything showing that was not used in D'r McLean's establishment?

Ans. Not on the books.

Q. Expense to California in 1871. You deduct how much on account of that time?

Ans. $2,050.00.

Q. Is there anything in the books showing specifically for what that amount was paid out?

Ans. There is not.

Q. Do the books show who went to California? Whose expenses were paid?

Ans. They do.

Q. What do they show?

865 Ans. I have not it on my memorandum, but I am very certain the same as expenses East and Europe were opposite D'r McLean's initials or his name.

Q. There is an item of furniture in 1871 of $1,121.90; is there anything on the books showing that was not used in the office?

Ans. Not on the books.

Q. Visit to Europe; D'r McLean; the amount is how much?

Ans. $3,182.80.

Q. Do the books show for what reason or on what business D'r McLean went to Europe?

Ans. They do not.

Q. In regard to the cost of stamps, why did not you include the cost of stamps, giving D'r McLean credit for the cost of stamps in making up the profits, the respective profits?

Ans. I intend to do it; I gave the cost.

Q. You intend to make up the account that way?

Ans. Yes, sir; it was understood the cost of stamps, private account, and rent of office was not included in this.

866 Q. The statement you have given, then, of the net profits for part of 1870 and part of 1872 is not according to your own view a statement of the real amount of net profits made by D'r McLean?

Ans. No. The cost of stamps can hardly be reckoned in as other costs; the amount of stamps used should be in proportion to the amount of packages used; for that reason it is left out. There is nothing to show the rent of office in the books.

Q. But the profits would be diminished by the proper cost of stamps and the proper rent of the house?

Ans. Yes, sir.

Q. Is there anything you have omitted?

Ans. D'r McLean's account. It was questionable and I left it out as understood.

Q. What is the amount of his private account?

867 Ans. I have not it here; I gave it in my previous statement sometime, the total for 1870, $1,634; the pro rata for fifty-two days, $232.78. The total for 1871, $1,705.00. The total for 1872, $1,490.50. The pro rata for 141 days, $575.78.

Q. Making a total from the time from November 9th, 1870, to May 22nd, 1872?

Ans. $2,513.56.

Q. How did you come to make out the statement?

Ans. I made it up at the request of M'r Denison or M'r Gray, I don't know which.

Q. When did they request you to make it up?

Ans. Yesterday, I think, or day before.

Q. I will ask you if, in your former examination as a witness in this case, you gave the total amount of sales of all merchandise by D'r McLean in his business for the years 1870, 1871, & 1872?

Ans. I think I did.

Q. The total of all the sales?

Ans. I think so.

868 Q. I will ask you between now and the next meeting to give us the gross sales of merchandise of every kind as shown by the books from November 9th, 1870, to May 22nd, 1872, and then the amounts of the sales for the same years, of each different kind of medicines.

Ans. I think I have that already.

At this point the further hearing of this case was adjourned until 2 o'clock, October 29th, 1874.

OCTOBER 29TH, 1874.

Pursuant to adjournment, the hearing of the case was resumed as follows:

H. R. BRIGGS.

Cross-examination resumed.

Q. (By M'r Reber.) In making up your accounts of the profits of merchandise, what account or accounts in the books of D'r McLean did you refer to?

Ans. The credit balance of merchandise from the ledger.

Q. Did you refer to the account of profit and loss?

Ans. Yes.

Q. Did you examine the books to see of what these profits con-
869 sisted, whether money or bills receivable or what else?

Ans. The face of the profit and loss account itself would show to some extent what it was. I did not examine to see how many accounts were outstanding. It would be necessary to go through the books to see how many were outstanding.

Q. Did you examine the books to see whether the credits, these profits which you found credited, whether they had been realized in cash?

Ans. I did not, but from the manner of doing business, of course the cash had not been received for all the sales; a large amount of them were sold on credit.

Q. The account which you made up of the amount of profits on merchandise does not show, and you have no means of knowing what was the actual cash value of these credits, have you?

Ans. Except from the face of the profit and loss account, and then it could not be decided except by taking two or three years to-
870 gether; for instance, some of the sales made during the year 1872 would not be collected till 1873 or 1874, and I could not tell, or any one else, unless they knew the standing of all the men who D'r McLean sells to during any one year.

Q. Suppose part of the debts were not collected at all?

Ans. This would show in that year, or subsequent years, the profit and loss; this shows in the personal account, or bills receivable, or receipts receivable; one of the accounts shows the bad debts.

Q. In order, then, to show the actual cash value of the credits which you give you would have to trace the accounts in the future?

Ans. It would be practically impossible to do it.

Q. That you have not attempted to do in this case?

Ans. No, sir.

Q. You are not able to say, from the examination which you made from these books, what was the cash value of the profits which you put down for each year?

Ans. No, sir.

871 Q. In the profits, the account of which you gave, there were large numbers of bills receivable?

Ans. In one year, I think so, and in other years there were debits of bills receivable.

Q. Merchandise sold on time for which bills receivable were taken, would be included in your account of the profit of a given year?

Ans. Certainly.

Q. So that in making up the accounts in profit for a given year the assets would consist more or less of bills receivable?

Ans. The assets at the end of the year.

Q. The assets included in the profits; for instance, you have a profit for 1870 of $135,000.00, merchandise profit; that is not cash, is it—actual cash on hand?

Ans. No, it is only cash on hand.

Q. What does it consist of?

Ans. To explain that, I would have to explain how that profit is arrived at; that merchandise profit is the aggregate of all sales made during the year, less the aggregate of purchases, which shows the
872 profits on goods sold of a certain amount; if for the goods sold money is not received for the bill, it is a loss to come out of the bill.

Q. How is that?

Ans. If the goods in any bill were not sold eventually it should come out of the profits.

Q. But your investigation did not lead you to know how much should be deducted?

Ans. Not for any particular year; every year is balanced by itself; some of the losses for 1871 were a part of the sales of 1870, which were found to be worthless accounts, and charged to bad debt account, although the sales were made previous; in the year 1871 sales are made and the accounts are supposed to be good, and the next year they are worthless; they came in the next year's account; so every year some items are charged to bad debt account, or loss.

Q. Your account don't show and your investigation don't show how much cash was realized in this item of $135,569.25?

873 Ans. Not on that particular item, but it shows the losses during that year. You will find further along, some receipts receivable, which is supposed to be lost, and personal accounts which are supposed to be bad debt accounts which are charged off, which I suppose are considered all the debts which are known to be bad at the end of that year.

Q. For aught you know, there may be accounts uncollected of sales made in 1870 and which are included in this merchandise profit; there may be still accounts outstanding and not collected?

Ans. Yes, sir; there may be to this day.

Q. And that may be true for 1870, 1871, and 1872?

Ans. Exactly.

Q. And how much of those accounts are uncollected you don't know?

Ans. No, sir.

Q. And also, what is uncollectable you don't know?

Ans. No.

Q. In that year, 1870, you would put down the net profit,
874 $66,368.74; that is, net cash, according to the books; that is not money on hand according to the books?

Ans. No; it is supposed to be good assets. The bad debt account is charged on the opposite side of profit and loss account.

Q. They were supposed to be good assets, because you still found them as good assets and charged up as good assets?

Ans. Yes, sir.

Q. But whether they were good assets, and ultimately were collected, you have no means of knowing?

Ans. No means of knowing.

Q. What was the actual cash value of this $66,368.74, you have no means of knowing, have you?

Ans. No means farther than the account shows.

Q. But the account don't show what was really collectable, or what was collected. You have not examined to see what was collected?

Ans. Certainly not.

Q. And to know whether it is collectable or not, you would
875 have to know whether the debtor is solvent and able to pay?

Ans. Certainly.

Q. These balances of net profits for 1870, 1871, and 1872 consist of bills receivable, receipts receivable, open accounts, and so on?

Ans. I think receipts receivable for 1870 and 1871 were balanced out, so there is more outstanding, but I won't be certain of bills receivable, but a large part of the assets would be in open account.

Q. In your statement for 1871 you put down to the credit after merchandise bills receivable, $28,999.62?

A. Yes, sir.

Q. Does that mean these bills receivable were collected in 1871?

Ans. The way D'r McLean's books have been kept he has balanced his receipts receivable and bills receivable at the end of every year, so at the end of 1871 his account shows a profit, in other words, more collected than were paid out on bills receivable.

876 Q. That means this $2,899.62 collected in that year?

Ans. Over and above bills receivable received.

Q. Did you examine the books to see when these bills receivable, which are credited here, were given?

Ans. No; I took the accounts from the face of the books as a profit and loss account.

Q. May they not have been given for merchandise prior to November, 1870?

Ans. Certainly they may have; some of them may have been: any of the bills receivable which had been considered, in the way he keeps his books, as bad debts prior to that year, which were collected that year, would increase that account—he charged them off as he would bad debts.

Q. Did you run back the accounts to see what proportion of them were given for merchandise sold prior to 1870?

Ans. I could not, unless I commence at the commencement of his business and trace it all the way down.

877 Q. Did not you examine them to see whether a very large proportion had been received before 1870?

Ans. Not enough to be able to say.

Q. To see a portion of them had?

Ans. I suppose they had, but not enough to know positively. I did not look back before that time.

Q. As far as these bills *are* receivable had been given for merchandise sold prior to November, or, indeed, prior to January, 1871, these bills receivable would not belong to the profits of the business of 1871?

Ans. No, not strictly speaking.

Q. In regard to the item of insurance you have credited D'r McLean with $55.00; what amount does the books show?

Ans. I think all the entire insurance account shows between two and three hundred of insurance, but that includes——

Judge REBER. I object to the testimony given by M'r Driggs on the 23d of October and to day, and move to exclude it from the consid-
878 eration of the master, for the reason it is irrelevant and immaterial, because it does not tend to establish or illustrate the issues involved in the case. First, that the profits on all merchandise being ascertained, it does not show what was the profits on the pills in controversy sold. Second, that the testimony of the witness and the account produced by him do not show what was the cash value of the

profits of merchandise which he has given, and further, that the statement made by the witness, professedly from the book of the defendant, does not correspond with the entries in the books, as he himself shows.

(The master overruled the objection and the evidence was admitted as tending to show the issues involved in the case.)

Q. Can you take the books of the defendant and ascertain at what time the bills receivable, credited here in 1871, were given?

879 Ans. I presume I could possibly: I won't say positively I can; I don't know how far back they extend and how they were kept years ago.

Q. Will you take the book and try?

Ans. I can try it.

Q. You know very well that this $28,999.62 bills receivable were not given for merchandise sold in the year 1871?

Ans. No; a good many of them were not.

Q. They were not given for merchandise sold from November, 1870, to January, 1871?

Ans. A great many of them: some of them may not; some were given in 1870 and paid in 1871.

Q. What proportion were given for merchandise sold before November, 1870, and what proportion for merchandise sold after November, 1870, you can't tell?

Ans. No, sir.

Q. You can't tell by an examination of the books?

Ans. It is doubtful.

Q. You can tell how many were given for merchandise sold

880 after November 9th, 1870?

Ans. A man may give a note for $500.00, and he may pay part of it and may buy more goods and put into it, and I can't attempt to divide off the moneys paid on goods sold at different times; notes may be taken up by new notes and goods sold and put into the note again, and it would be almost impossible to do it.

Q. You can tell, by an examination of the books, approximately, how much of the bills receivable, which are credited here, were given before and how much after November, 1870?

Ans. Approximately, I don't undertake to say positively, but I don't think I can.

Q. Can you, by an examination of the books, ascertain how much was realized in cash on these various items of merchandise profit for 1870, 1871, and 1870?

Ans. How much has been realized up to this time?

Q. Yes.

881 Ans. No; it can't be shown very well. These accounts are the same as bills *as* receivable. A man continually buys goods, and he pays on account; he buys a thousand dollars' worth of goods and pays a hundred dollars, and I can't attempt to divide off the money to any particular bill of goods. It would be impossible for a bookkeeper to do it unless he assumes a great deal.

Q. In this account of merchandise is included the sales of merchandise absolute, and sales on commission as well?

Ans. Those made on commission, and entered as sales, it includes. I don't know that there were any on commission. The books don't show. They may have been.

Q. There is no possible way of telling from your account as to what is the cash value of merchandise profits for the three years given?

Ans. No possible way of telling from the books.

Q. They may be worth one-half the amount or two-thirds of the amounts?

882 Ans. They would be likely to be worth more than one half or two-thirds, unless they stand as open accounts to this day.

Q. Is there anything to show they don't?

Ans. Yes; there is something; some of them may stand open.

Q. I asked you the other day to hand me a memorandum of the quantities of goods sold.

Ans. I had made it previously. It included all the sales except about $20,000.00, which were made without giving dates, as I stated before.

Q. Have you the money value?

Ans. No; I did not understand that. I thought it was the quantities; I gave the aggregate value the other time. I thought it was what I had made before, and I made no examination.

Q. You did not give the money value?

Ans. No; I understood it was what I had made before. I got the quantities before.

883 Q I think, in your investigation before, you ascertained the quantities and value of each, and in giving your testimony you were not asked.

Ans. I gave the value, $270,000.

Q. The aggregate value of the different medicines you did not give before?

Ans. No; the aggregate quantities, and the value of the aggregate quantities.

Re examination:

Q. (By M'r Denison.) Where did you get this item of merchandise profit for the different years which you have testified to?

Ans. It is shown in the merchandise account, and also in the profit and loss account.

Q. State whether you found that as a balance on the defendant's books.

Ans. The credit balance to merchandise; yes, sir.

Q. I understand you the defendant's account, as stated in his books, show a profit on the merchandise account for the different years, as stated by you here?

Ans. Yes.

Q. Do you find these balances struck for the different years, so far as you examined the books?

Ans. For the three years.

884 Q. Did you examine the books prior to that time and subsequent?

Ans. No; I did not; not to be able to state; I saw them, of course.

Q. State whether the item of bills receivable appears in the defendant's books, showing a classifications of these assets.

Ans. You mean a classification of assets of bills receivable from other assets?

Q. No; bills receivable among themselves.

Ans. No; the books show, by tracing them back to a greater or less extent, who they were made by, who received from; so far as showing different values, they don't show them.

Q. Do not the books show which of the bills receivable were considered by the defendant, in his books, as good and which bad?

Ans. At the end of each year they are all changed off as bad, and if there are any outstanding they are balanced; one year there

885 was more money received than bills receivable, and bills receivable shows a credit balance, of course.

Q. Then I understand you that the defendant's bills receivable account is closed up at the end of each year?

Ans. Closed at the end of each year.

Q. And balanced?

Ans. And balanced.

Q. Is the total balance charged off to profit and loss?

Ans. With one exception; there is a small item carried forward in one year.

Q. How is it carried forward?

Ans. Carried forward in profit and loss; if any of those accounts are collected the next year they go to bills receivable.

Q. So that the accounts, as they appear in defendant's books, show an adjustment at the end of each year?

Ans. They do.

Q. What is the difference between a series of years between that method of stating the account and analyzing it at the end of each
886 year bills receivable, reck*on*ing those considered good as assets and the bad as a loss?

Ans. Well, that would be difficult to say; if the same proportion of bills receivable received previously were collected the same each year, it would make no difference; one year there might be a large amount, and another year but a small amount would be collected.

Q. Suppose the character of the bills receivable to be uniform through a series of years, would there be any practical difference between the account as stated in the defendant's books and one stated as I have just mentioned?

Ans. There might be some difference. It is hard to say just how it would be

Q. From what you saw of the defendant's books, and the manner of keeping them, are you able to state whether or not for a series of years it is not likely that at the beginning of a term and the close of a term he amount and value of the bills receivable would continue to be about the same?

887 (Counsel for the respondent objected to the question, and the master sustained the objection.)

Q. How does the defendant in his books treat the balances of merchandise profit which you have stated, as good or bad?

(Counsel for respondent objected to the question, and the master overruled the objection.)

Ans. From the way the account is kept, it is supposed to be good. The balance of merchandise profit bad debts are charged off in another way in the debit of profit and loss.

Q. That comes out of merchandise profit?

Ans. Virtually does, although it is not charged there.

Q. Look at this paper marked "Exhibit X Y 2," and state what it is.

Ans. The statement on the two first sheets of "Exhibit X Y 2" is intended to show the profit and loss of D'r McLean's medicine business for the years 1870, 1871, and 1872, exclusive of stamp-account, rent, and M'r McLean's personal account.

888 Q. What is the third sheet?

Ans. The third sheet shows the deduction made during the year 1870, 1871, and 1872 from the expense-account, as shown by his books.

(Counsel for complainant then offered the paper in evidence. Counsel for respondent objected, and the master overruled the objection.)

Recross-examination:

Q. (By M'r Reber.) You made most of the deductions without any reason appearing on the books for your making them?

Ans. Except, perhaps, the nature of the account, they did not have anything to do with his medicine business, and I so explained it in my testimony.

Ques. In most of the entries it did not appear but they might have something to do with his business?

Ans. Some of them might have.

Q. In most of them is there anything to show the items did not relate to his medicine business?

Ans. I can't say. Most of them; for instance, the donation ac-
889 count. I take that for granted it did not, and the water, because for his residence, and some other accounts.

Q. What other accounts?

Ans. His expenses to California. There is a possibility it might have, but I took it for granted it did not; and furniture, which is a large item.

Q. Is there anything in the books to show?

Ans. No; I took M'r Taylor's word.

Q. It is a mere inference of yours and an outside party?

Ans. It is a statement of M'r Taylor's, stating that all the furniture charged to expense was——

Q. Who suggested to you the expense of the trip to California should be excluded?

Ans. No one.

Q. Why is it that you made any deduction from the expense account at all. Who suggested you should treat the books in that way?

Ans. I made a complete for D'r McLean of all his profits and loss account, and at the suggestion of M'r Gray I made another
890 statement, which would show the profit and loss for his medicine business.

Q. As to some of the items, you inferred they did not relate to his medicine-account, and therefore deducted them?

Ans. Yes, sir.

Q. The insurance-account, also; did you inquire as to that?

Ans. I think perhaps every item states what it was for. One or two items, insurance on the paper-stock and insurance on building; I took it for granted the insurance on the building on 4th and Market and North street did not have anything to do with the medicine business.

Q. Is there insurance on 314 Chestnut?

Ans. Yes, sir.

Q. That is D'r McLean's place of business?

Ans. Yes, sir.

Q. And you made deduction of that item?

Ans. Yes, sir; supposing, of course, I stated the allowance for rent was not included, it would come out of the rent the same as if he hired the building.

891 D'r McLean recalled by complainant.

Q. (By M'r Denison). State for what purpose the money appearing in your expense-account for 1870, $386.00, J. H. McLean expenses east, was expended.

Ans. For my business.

Q. How for your business?

Ans. I always do business when I am travelling away from home. I am always travelling on business constantly. I never go east or west, never go south or north, unless I am on business.

Q. On what business did you make that trip?

Ans. I don't recollect, in the medicine business of course; I don't recollect any special business.

Q. Did you go east more than once that year?

Ans. I don't recollect.

Q. Are you able to state what you went for?

Ans. No, sir.

Q. How much money did you take with you?

892 Ans. I could not tell, sir. Sometimes I make drafts, and sometimes I take the money with me.

Q. Do you remember of going east at one time during that year and drawing out for that purpose $1,000.00, having it charged in the expense-account, and on your return paying in all but $386 and getting credit for the balance?

Ans. I don't recollect it, but that is my habit of drawing out a certain sum of money.

Q. I ask you if you remember that circumstance?

Ans. No; I will explain it if you wish me to.

Q. I object to the explanation.

Ans. I can't recollect three years back; it is impossible.

Q. Do you remember whether you went east more than once during that year?

Ans. I do not.

Q. Do you remember going east at all that year?

Ans. I think I did, for I go east every year.

893 Q. Do you know what business in connection with your medicine you had to transact at the east that year?

Ans. No, sir.

Q. Do you remember you had?

Ans. I always have.

Q. How do you remember that you had any, if you don't remember any?

Ans. I always do.

Q. If you don't remember anything about the trip, how do you say it was business purposes?

Ans. I always travel for business purposes; when I travel for pleasure, I travel for that purpose; I travel to make business whereever I go: that is my line of business, that is my business.

Q. Did you lengthen your trip on any of these occasions which you remember for the purpose of pleasure?

Ans. I don't know. It don't make any difference: whether for pleasure, I make business. I never go to a place where there is a drug-store or medicine sold but what I do business, I go there for business.

894 Q. Whenever you are travelling for pleasure you connect medicine with it if you can do it?

Ans. You bet your life I do.

Q. In such cases do you charge up the expenses of the trip to the business?

Ans. I do most emphatically.

Q. When you are travelling for pleasure?

Ans. I never travel for pleasure alone.

Q. Pleasure in part?

Ans. Yes, sir; I always take pleasure in travelling. I travel for business alone; I can't go into any city in the United States I don't do business in, or in Europe.

Q. Take the item of water-license for residence, $39.00, charged in your expense-account for 1870; what connection had that with your medicine business?

Ans. I cannot tell.

Q. Do you remember the character of the items composing your donation-account for the year 1870, footing $588.80?

Ans. No, sir.

895 Q. If these items which are entered as donation had been properly chargeable against your medicine business, would they not appear as items of expense under their proper heads?

Ans. No, I think not.

Q. Why not?

Ans. Because they refer to the very fact itself of being a donation for which I get not credits.

Q. If they related to your business they would properly be chargeable in the business expense-account, would they not?

Ans. I don't know that they would; sometimes I made more money in making a donation than I would by advertising.

Q. Why is it that these items are separated from your ordinary business expenses in your account?

Ans. I really could not tell you.

Q. Take the items, furniture, $5,243.18, appearing in your expense-account for the year 1870; how did you know that furniture in your business?

896 Ans. I could not tell you; I really don't know the time. It is so long ago, I would have to have the item before me.

Q. Could you say it was used in your business?

Ans. I could not. I filled up my store in walnut about that time. I can't tell you exactly.

Q. Was it during the year 1870?

Ans. I could not tell you; it was about that year 1870 or 1871.

Q. Did not you fit up your house the same year?

Ans. I think I filled my house in 1869; that is my recollection; I know I moved into my house in 1869.

Q. Did not you charge up the bills for that furniture in your expenses of 1870?

Ans. I could not tell you; I think I paid them in the year it was made. It was cash; that is my recollection.

Q. Did you buy any furniture for your store during the year 1870, amounting to $520.00?

Ans. I could not tell you, really.

897 Q. Since M'r Diggs testified the other day, have you examined your books about the matter?

Ans. I have not.

Q. Have you conversed with M'r Taylor, your bookkeeper, about it?

Ans. I have not had time; I have been too busy.

Q. Have you taken any pains to inform yourself about the terms he was asked the other day?

Ans. No, sir.

Q. Take the item of carpeting, of $218.32, appearing in your expense account for 1870; what was that carpeting for?

Ans. If I recollect right, it was to furnish the room now occupied by M'r Pitzman.

Q. Will you swear that was the case?

Ans. I believe it was the case. I never bought that small amount of carpeting at one time.

Q. It is your recollection that was the purpose?

Ans. That is my recollection; I used that room as an office at
898 that time; I think in 1870, 1871, and a portion of 1872; that is my recollection; I used it as my own individual office.

Q. Did you take the carpet out?

Ans. Yes, sir.

Q. When?

Ans. I took it out when I rented it to Col. Pitzman.

Q. When did you rent the place to Pitzman?

Ans. I could not tell you exactly.

Q. What year?

Ans. I could not tell you; my recollection is about the fall of 1872, I think.

Q. Take the item of expenses to California in the year 1871, charged in your expense-account that year, of $2,050; who went with you to California?

Ans. My wife.

Q. Who else?

Ans. My niece, a little boy, and my little baby and servant.

Q. Were you traveling on business then?

Ans. Yes, sir; most emphatically. I made more money then; that was the best trip I ever made in my life.

899 Q. Was it necessary for business purposes that you should take your wife, niece, child, and servant?

Ans. My niece paid her own expenses.

Q. Will you answer my question?

Ans. I said my niece paid her own expenses, and my family was necessary for my trip.

Q. Necessary for the transaction of the business you were engaged in?

Ans. Not exactly necessary, but it was part of the programme; I went there on business; I went there to establish my business there, and did so, to Salt Lake and California.

Q. What proportion of that was chargeable to your own expenses?

Ans. All of it.

Q. Did it cost anything to take your wife?

Ans. Yes, sir; I considered it was part of the business; I could afford to pay my wife's expenses.

Q. What part of the money was properly chargeable to your own individual expenses?

Ans. All of it.

900 Q. Was all of it incurred for your individual expenses?

Ans. All for my wife, myself, and child.

Q. If you had been sending another man in your place would you have considered it necessary to pay that amount for his expenses?

Ans. Yes, sir; and cost me more, too, with his time and salary and expenses.

Q. I am asking about expenses, not time.

Ans. That is the position I take in the matter, and that is the reason I charged it to expenses.

Q. How long did you stay there?

Ans. Three or four weeks I think; maybe longer, I have forgotten; no, it was six weeks.

Q. How long did you stay in San Francisco?

Ans. I believe I staid there a week.

Q. Where did you stay the rest of the time when not travelling?

Ans. I staid a week in Salt Lake; several days in Sacramento, in Lower California, and the balance was taken up in traveling, I believe.

Q. Did you go to Yosemite Valley?

901 Ans. No, sir.

Q. What other places did you visit?

Ans. The places I have mentioned.

Q. Any other places?

Ans. Not any other, only th'ough California generally; I stopped at large cities; the next time I will make a more general tour.

Q. Did you take your family out riding in San Francisco?

Ans. I did not.

Q. Did you hire any carriages while you were gone?

Ans. No; friends hired them for me and took me out.

Q. Take the item of water-license for residence, $52.00, appearing on your expense-account for 1871, what connection had that with your business?

Ans. I don't know as it has any.

Q. What do you say as to the item of donations?

Ans. The same as before.

Q. For the year 1871, amounting to $919.85, was that for any expense connected with the carrying on of your business?

902 Ans. I really could not tell you.

Q. If it had been such should it not be entered under the appropriate head in your books as expenses?

Ans. I really could not tell you.

Q. Why do you keep a separate donation-account?

Ans. I think I keep a donation-account for the purpose of showing how much I give away, how much is given away in a business view, and how much merchandise.

Q. What you have given away appears on your books as donations?

Ans. Yes, sir; for instance, I gave a gross of liniment and a gross of pills to a church in Alabama, and that done me more good than forty times the price.

Q. What was the matter with the church?

Ans. They were building a church down there and they sell the goods down there in the country, and it does me a good deal of good; it is charged up as a shipment, and if it is charged as a shipment it

903 must go to the proper place. It is bread cast on the waters, and I don't know whether I will get a cent. It is part of the advertisements; it is the donation-account.

Q. You chose to give it away, and did so?

Ans. Yes, sir; certainly.

Q. It don't enter into your merchandise account at all?

Ans. Yes, sir; it enters into the merchandise and is charged to the donation account from the merchandise account.

Q. Take the item of furniture, $1,121, in your expense account for 1871, and state what that amount was expended for.

Ans. I could not tell you unless I go back and see what it was for. I furnished my room up-stairs very nicely to receive my customers.

Q. Did you spend the money for that purpose?

Ans. I could not tell you. I know the items of that furniture.

Q. What furniture did you buy for your office during 1871?

Ans. I could not tell you without referring to it to see what it
904 was.

Q. What furniture have you in there?

Ans. I have been making additions to it every year—a safe-vault—I think I have spent for one safe. I presume maybe that is it. I got a steel safe that cost me $900.00 that year. That is it. That is it—a burglar-proof safe. That is it. That is my recollection.

Q. You have it now, haven't you?

Ans. Yes, sir.

Q. You have all this furniture?

Ans. No, not all of it.

Q. You have not sold any of it?

Ans. I sold it in Pitzman's room.

Q. What did it consist of?

Ans. Chairs and tables and stands.

Q. 1872 I find an item in your expense account, J. H. McLean, expense to Europe $3,182.50. Who went with you to Europe?

Ans. My wife and baby and niece.

Q. A servant?

Ans. No, sir.

Q. What business did you have in Europe?

Ans. To start my medicines and to see the sports at the same
905 time. Very few travelers but travel for seeing fun as well as business.

Q. Do you have a large or small sale of your medicines in Europe?

Ans. Just started. We make the sales small at first and get to be large.

Q. Up to the 21st of May, 1872, how much had been realized from your sales in Europe?

Ans. Maybe not more than a hundred dollars; but I have laid a foundation for a large sale one of these years.

Q. And you will derive a profit of that from the sales?

Ans. No; I go to work and advertise to-day in the paper to-day, and may not get the benefit for two years. I may make an almanac or I will never get anything. I have to make agencies or I will not sell.

Q. Did you ever ship any medicine to Europe?

Ans. Yes, sir.

Q. How much have you shipped there?

Ans. I could not tell you.

906 Q. When did you first begin to ship there?

Ans. I took a lot out with me.

Q. How much did you take?

(Counsel for the respondent objected to the question, and the master sustained the objection.)

Q. It. L. B. & N. Library $175.00. What connection had that item in your expense account of 1872 with your business?

Ans. I guess that was a donation of an organ to the Faur Caurts Library. I think it is.

Q. Ex. to Bank of Commerce $2,138.00. What is that? How does it happen to be in your expense account for 1872?

Ans. I could not tell you. It is a matter of dollars and cents calculation. Maybe I have made a speculation and thrown that amount of exchange on the market. Sometimes speculate heavy, and that exchange was debited to my account.

Q. It means you drew out $2,138.00 to buy exchange on the
907 Bank of Commerce?

Ans. It may have been; I don't know. Is not there a credit on the opposite side; if it was, it was a balance, a speculation.

Q. I find another item on the other side.

Ans. I went on and bought exchange and resold it for a profit; I sometimes do those things.

Q. I find another item—it appears to be on the other side of the account—"Less cash returned, $2,006"; has that any relation to the last-mentioned item?

Ans. Maybe that is an exchange; maybe the $500.00 is what I made on the transaction, the difference between that and the other; I made that clear of all expenses.

Q. Then you say that was a speculation?

Ans. I do not know; I only guess from the appearance.

Q. You presume so?

Ans. I only guess so.

Q. Life-insurance C. H. McLean, $322.30. I find as one item
908 of your expense account; what connection had that with your business?

Ans. It saved me $10,000.00.

Q. How?

Ans. I was president of another company; they had an insurance, and by taking out insurance I paid off my debt; if I hadn't taken the insurance, I would have had to pay the debt. I carried $10,000.00 of the loan on the Masonic Hall Association, if we could not make the loan to get our money back. It was part of the terms to get the loan.

Q. Insurance on your own life?

Ans. No; insurance on my son's life for my loan to his credit; that was the business. If a man can save 10,000.00 by paying $300.00; I felt pretty good about that; I think that is clear gain to the business.

Q. You got insurance for the purpose of giving yourself a credit to enable you to carry the loan?

Ans. No; I loaned the Masonic Hall Association to the amount of $10,000.00, the other director. There was no way of making
909 this loan good, unless we made the loan on second-mortgage bonds; we made the loan of $42,000.00 and I got my money back. If each one of us should take out $10,000.00 insurance, they would loan the money.

Q. Take the item of pew-rent, $52.00 charged in your expense account for 1872; state what connection that had with your medicine business.

Ans. I don't know that it had any. Probably, I don't know but that it was for a bad debt; I don't know. Sometimes I have to do those things.

Q. The item of portrait of Richards?

Ans. That was a bad debt; I took that for a bad debt. I took the portrait, and he paid me the balance in money.

Q. How does it happen to be charged in your expense account?

Ans. I think it is a part of the expenses that I managed the thing that way. I consider I personally ought not to be charged with expenses.

910 Q. And this item, less cash returned, you think refers to the previous item of cash to the Bank of Commerce?

Ans. I think so; it looks like it.

Q. You were present the other day when Mr Driggs was examined touching these items from the statement of your business?

Ans. Yes, sir.

Q. State whether you have made any inquiry or examination with

reference to these items, so as to know the purposes for which these expenditures were made.

Ans. No, sir.

Q. Why have you not done so?

Ans. Because I know what they were made for—general expenses. I knew what they were made for, large amounts such as them.

Q. Why are you not able to state now what they are made for, and made in connection with your medicine business?

Ans. I don't know.

911 Q. Can you by making an examination of your books or that memorandum which you have ascertain in regard to the items about which I have inquired so as to be able to state whether they were used in connection with your business?

Ans. There is nothing there that I could make any reference to unless it was the furniture; I might get to know to what that referred—the items of furniture—all the balance I would not know.

Q. As to these items you might?

Ans. I can't tell; I employed a certain set of men to fix up my place, and all these things are destroyed. I just employed a man and he has gone to fix a window. He brings in a charge, and I can't tell whether they are at my house or not.

Q. Will you look at your books and see whether or not you are able to get that information?

Ans. I will try.

Q. I ask you now as to the items I have inquired, whether or not you will make investigation of your books and other memorandums,

912 which you have access to, for the purpose of stating what connection, if any, they had with your medicine business? Take the list here and make inquiry generally in regard to the whole of them? Do you know from whom you bought any of that furniture?

Ans. No, sir.

Q. Or the carpets?

Ans. No, sir.

Q. Do you know where you bought it?

Ans. No, sir.

Cross-examination.

Q. (By M'r Reber.) M'r Wolf testified the other day about the value of the rent of your store and establishment, and also the value of the rent of the adjoining property, occupied by M'r O'Bear. State what is the comparative size of the two properties?

Ans. The O'Bear building is 24–6 by 60, in the shape of an L.

Q. How many stories high?

Ans. Three stories high.

Q. What are the dimensions of your store building?

913 Ans. 27x85—five stories high.

Q. Is your store on the alley and his inside?

Ans. Yes, sir; inside lot, yes, sir.

Q. What would be the reasonable difference of rent of the two establishments?

Ans. To any one that wanted—there would be $2,000.00—and the use of the factory in the rear.

Q. What do you know, if anything, about your ability to rent the two houses in 1870, 1871, and 1872?

Ans. A firm offered me at the rate of $4,500 for the O'Bear property.

Ans. It may have been; I don't know. Is not there a credit on the opposite side; if it was, it was a balance, a speculation.

Q. I find another item on the other side.

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Ans. The O'Bear building is 24-6 by 60, in the shape of an L.

Q. How many stories high?

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Ans. Yes, sir; inside lot, yes, sir.

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Ans. To any one that wanted—there would be $2,000.00—and the use of the factory in the rear.

Q. What do you know, if anything, about your ability to rent the two houses in 1870, 1871, and 1872?

Ans. A firm offered me at the rate of $4,500 for the O'Bear property.

in 1871 and 1872; frequently I could have got more than $5,000.00, if I had offered it; they wanted it for a bank.

Q. An account was made up by M'r Driggs, taken from your books, of the merchandise profits of the years 1870, 1871, and 1872. Will you state in what shape the profits were, the thing indicated by merchandise profits, in what state it existed?

Ans. It was in bills receivable, receipts receivable, and merchandise on hand, of course.

914 Q. The statement then in the books of so much of merchandise profits at a particular date does not indicate that there was that much cash on hand, or what is covered by merchandise profits is exactly that much cash?

Ans. No; we send out a bill of goods for instance—we commission out all goods—these goods may come back to us, they may return them and we have to pay two freights, and return at the expiration of six months; they may be sold out or they may stay four or five years; they may be returned, to' I will state M'r Driggs was perfectly right in regard to bills receivable and receipts receivable. If I ship a bill of goods to Tom Jones, at Sedalia, those goods may amount to $1,000.00. He may sell $100; he may sell the pills or liniment, and fill up the liniment account and take a new note. Some medicines may not sell this year, and the next year they may sell; they may not run this year, and next year they may go ahead. That is the way of our business. We run our goods according to our advertising.

915 Q. How much you realize out of the accounts under the head of merchandise profits depends on your luck in making collections?

Ans. Yes, sir; and the amount of sales we make.

Q. If you have an account, with a given credit for merchandise profit, how much you shall collect out of that account depends on your luck in making collections?

Ans. Certainly.

Re-examination:

Q. (By M'r Gray.) Did you ever pay any rent for your business in the years 1870, 1871, and 1872?

Ans. No; not that I recollect of.

Q. Did you charge up against your business any rent during those years?

Ans. I believe not.

Q. Don't you know you did not?

Ans. I don't keep the books. At the same time items of that kind may come in.

Q. Are you master of your business?

Ans. Yes, sir; I am completely, and yet I don't know the details.

Q. Don't you know whether you directed your bookkeeper to

916 charge up rents against your business?

Ans. I have not.

Q. You know you have not, then?

Ans. That is what I said. I did not know.

Q. How many stories is your building on the front?

Ans. Four stories.

Q. What do you mean, then, by saying it is five stories?

Ans. Yes, sir; it is one story over my store; occupies two stories in the rear.

Q. What you mean to say is, it is four stories in front and five stories in the rear?

Ans. Yes, sir; beginning forty feet back it is five stories high.
Q. You mean what constitutes one story in front is two back?
Ans. Yes, sir.
Q. Who were the parties that offered $5,000.00?
Ans. I had a number of them.
Q. State them.
Ans. I can't recollect them. I could not tell you.
Q. Name some one of the parties that offered you $5,000.00.
Ans. I could not tell you.
917 Q. You could not name anybody?
Ans. No, sir.
Q. Could you fix the time?
Ans. No; I know it was in that time. I built that building of Obear's in 1869. I know it was two years after that.
Q. You can't fix the time?
Ans. No.
Q. How much of your building is occupied by stairways; do you know?
Ans. Six feet; four and a half feet.
Q. Which will you have?
Ans. Six feet down at the bottom and four and a half at the top.
Q. The stairway all the way up in front is off of the lot you occupy?
Ans. Yes, sir.
Q. How far back does that stairway go?
Ans. A little over forty feet, I believe.
Q. When did you build the building where you are now?
Ans. I think in 1867. I did not build it altogether. I only built a portion. I tore it down to the first story, and built it up.
918 Q. You said that you were offered at the rate of $4,500.00 for the Obear building?
Ans. Yes, sir.
Q. What did you mean by that? What was the offer for?
Ans. It was for the two first floors.
Q. Well, then, what do you mean; what were you offered for the first two floors?
Ans. At the rate of $4,000.00.
Q. What was the price of the two floors?
Ans. I was offered $3,900.00.
Q. Who was the man?
Ans. M'r Barada.
Q. A. S. Barada?
Ans. Yes, sir.
Q. He is dead now?
Ans. Yes, sir; he wanted to move himself up there, and I had two or three other persons who wanted to get them.
Q. Who were the others?
Ans. I can't recollect them. I have many persons coming there; come and make me a big offer, and I don't know their names. I have agents come there.
919 Q. All the people that offered you this were strangers; people you don't know?
Ans. I can't think, three years ago.
Q. You have just thought and remembered the fact you were offered $5,000.00?
Ans. Yes, sir.
Q. Well, you remember that in your profit account, as stated here by

M'r Driggs, the bills receivable and receipts receivable go in to make up that account?

Ans. I know that is my business; I know it is everybody's business.

Q. Do you ever have any money in your business?

Ans. Yes, sir.

Q. Did you have it in 1870, 1871, and 1872?

Ans. Yes, sir.

Q. How much of it was money?

Ans. None of it; it is bills receivable.

Q. No money in the balances he found?

Ans. No, sir; it is bills receivable and receipts receivable.

Q. Where had the money gone?

920 Ans. It comes in during the year; at the expiration of the year, if we have no money on hand, we have no money. Money comes in during the year.

Q. You don't mean to say you did not receive any money in your business?

Ans. No, sir.

Q. You don't mean to say you made no money?

Ans. I say I made some money.

Q. Was not the whole balance he showed as profit money?

Ans. No.

Q. What had you done with the money you made?

Ans. We put it in the business again.

Q. It was there in money, or money you put in merchandise?

Ans. Yes, sir; put in merchandise.

Q. Does your business average about the same from year to year?

Ans. No; a good deal of difference.

Q. How was it during these years, 1870, 1871, and 1872; did it average pretty near the same?

Ans. I can't say; I have seen by M'r Driggs' returns; I suppose they are correct.

921 Q. You know about your expenses?

Ans. No, sir.

Q. Have not you testified your expenses were about $25,000.00 each year?

Ans. Yes, sir; because I saw it on the books.

Q. Were they not the same each year?

Ans. No, sir.

Q. Did not you make an estimate of $25,000.00 for a year and a half, making $37,500 as your expenses for that year and a half?

Ans. Yes, sir.

Q. Did not you assume they were the same?

Ans. No; they were from the books.

Q. They were the same?

Ans. No; there was considerable difference.

Q. How much difference?

Ans. I could not tell you unless you look at the memorandum. I would not know unless I got the item.

Q. As you sell goods and receive the money for them you invest the money in merchandise again?

Ans. Yes, sir.

922 Q. Do you take an account of stock at the end of each year?

Ans. Yes, sir.

Q. In making that account of stock how did you fix the prices of your merchandise on hand?

Ans. By the cost.

Q. Then, in taking the account of stock to ascertain what your merchandise profit, if you chose to call it so—your profit for the year was, you fix the price of the stock on hand at cost?

Ans. Yes, sir.

Q. Your materials are always worth to you what they cost?

Ans. Sometimes not. Sometimes materials goes up and down, according to the purchase.

Q. How was it in 1870, 1871, and 1872?

Ans. I can't tell you.

Q. Is the profit and loss account—you have a profit and loss account—in your books?

Ans. Yes, sir.

Q. What do you put into that?

Ans. I think you will have to go to the bookkeeper to explain that.

Q. You don't know?

923 Ans. I could see if I looked at it. It was explained here a few minutes ago. I have got to be particular; I am not a bookkeeper and don't propose to be a bookkeeper.

Q. You don't know what goes into your profit and loss account?

Ans. No, sir.

Q. Do any of the uncollected bills or receipts receivable go into it?

Ans. Yes, sir.

At this point the further hearing of this case was adjourned until Wednesday, November 3rd, 1874, at 2 o'clock p. m.

NOVEMBER 2ND, 1874.

Met pursuant to adjournment; present as before.

D'r J. H. McLEAN recalled.

Examined by M'r Denison:

Q. Have you made examination of your books, or sought in any other way to ascertain the purposes for which these items of expenses were made?

Ans. Yes, sir.

924 Q. I will ask you first about your trip East.

Ans. It was for my expenses East I went all over them; there is no doubt about them, and there is no doubt about the furniture, in my mind.

Q. What do you now say about the furniture?

Ans. That furniture was for my private residence; the furniture in 1870, $5,243.78, that was for my residence. The carpets I cannot tell about; just as stated then for the up-stairs room. I cannot tell where it was, the amount; I never got any item to tell that.

Q. As to the donation accounts, have you examined those?

Ans. Yes, sir; but I could not tell what they were for. I have no evidence now what they were for, only in a general way. The carpet, $218.32, was for Pitzman's room over my store. I occupied it as an office at that time.

Q. How long did you occupy it as an office?

Ans. I could not tell; I didn't notice that. I meant to have done

925 so but I didn't. I think I occupied it about a year and a half or two years; maybe two years.

Q. What kind of carpet was it?

Ans. Brussels carpet.

Q. How large is the room?

Ans. 48 feet by 27.

Q. Did you find a bill for this carpeting?

Ans. No, sir.

Q. What did you do with that carpet when you abandoned that room as your office?

Ans. I have got it rolled up yet.

Q. Do you know what it cost?

Ans. No, sir; I do not.

Q. Are you certain that that was the amount for which this was given?

Ans. No, sir. I stated not. I saw the carpet; $218.32. That is all the entry I saw of it.

Q. Is there any way in which could learn?

Ans. No, sir; because there were no amounts that I never keep.

Q. Did you not put carpeting into your house that year?

Ans. No, sir; the year before.

926 Ans. No, sir; this was carried from profit *to* loss to this year, from 1869 to 1870.

Q. When did you put the carpets into your house?

Ans. 1869.

Q. Did you pay all the bills in 1869?

Ans. No, sir; not all the furniture bills in 1869.

Q. The carpet bill?

Ans. Yes, sir.

Q. Did you put all your carpets in at one time?

Ans. I believe I did. It was a new house that I put it in. That is my recollection. I never questioned it.

Q. Don't you remember making a separate purchase of carpeting for your house which is charged in this item?

Ans. No, sir. If I did I should not have known this was for the house. I had no way of telling.

Q. Don't you remember making any separate item of purchase?

Ans. No, sir.

Q. For your house?

927 Ans. No, sir. I furnished my house from top to bottom with carpets when I went into it. That is the reason I didn't make any further enquiry. I had no second purchase to make.

Q. What have you to say in regard to item $1,121.90 charged for furniture on your house, 1871?

Ans. I found that, but I could see no positive item. Taylor said that was also for my house, extra furniture put in there, book-cases and so on.

Q. Item St L. B. & L. Library, $175.00, I understand you to say that was for the benefit of the jail library?

Ans. That is my understanding. I didn't look at that because I was nearly positive of it.

Q. Did you examine the item $2,138.10, exchange to Bank of Commerce?

Ans. That was part of my trip to Europe.

Q. There is an item on the opposite side described as less cash returned, $2,006.11?

Ans. The way this matter came about was this, you *say* the 928 way we do when we get a letter of credit to go to Europe, my bank here charges me up with a certain amount of money when he expects the letter back again, when persons ever go to Europe they deposit either bonds or collateral, or credit, either, with the bank, and

when they come back having a letter of credit for five or ten thousand dollars, they are charged then with the letter of credit; this letter, as I understand it, Taylor showed it to me, and the reason why it was not entered in the first part they had no account of it, but when they got it I gave them a check for it upon the account. That is the way it came in.

Q. That item should be diminished by the amount of $2,006.11?

Ans. No, sir: there is no entry of cash returned that I see; I just see the entries of $3,182.80, my expenses to Europe, and then I see the entry again of expenses to Europe—paid to Bank of Commerce $2,138.11; I know I had two letters of credit, one was J. Cook & Co., by the
921 way, & the other was on the Bank of Commerce. The entries were J. Cook $3,182.80, Bank of Commerce $2,138.10.

Q. What year did you go to Europe?

Ans. In 1872 I returned. I went in the spring of 1872, I believe it was.

Q. You went there in the spring of 1872?

Ans. The entries were made at that time.

Q. What is the date of the entry there?

Ans. This is marked 1872.

Q. What time did you go to Europe?

Ans. I must have gone in 1871, or spring of 1872. I went in the month of May, 1872; and yet I cannot say that it was in May, because this suit was brought in 1872.

Q. You didn't go until after this suit was brought?

Ans. I believe I didn't. I could have seen to the very moment when I went to Europe, but I didn't think it was worth while.

Q. Didn't you engage Mess'rs Hill & Stratton to file your answer in this case before you went to Europe?

Ans. I believe so: yes, sir; I think it was in May; it was in
930 June I left. I don't keep any dates in my head, unless I look at them. I didn't think it was necessary to call my attention to them.

Q. Then I understand you to say that that item expended to Bank of Commerce, $2,138.10, was paid of your expenses to Europe?

Ans. Yes; that was the amount paid to the Bank of Commerce for their letter of credit.

Q. This item—portrait, Richards, $15.00—did you make any examination in regard to that?

Ans. Yes, sir. That was a personal affair.

Plaintiff closes.

Adjourned to 2 o'clock Wednesday.

NOVEMBER 4TH, 1874.

Met pursuant to adjournment, and the hearing of the case was resumed as follows:

H. S. DRIGGS recalled by the respondent.

Q. (By M'r Reber.) Look at that book before you, and state
931 whether that is one of the defendant's books that you examined?

Ans. This is the ledger.

Q. Look at page 55 and following, at the account headed printing and paper account: did you examine that account and testify and give the result of your examination?

Ans. I examined it some time ago with a view to find out what proportion was printing and paper. It was some time ago.

Q. And you gave the result?

Ans. I think so.

Q. At whose suggestion or whose instance did you examine that account?

Ans. I think, at M'r Gray's request. I don't remember now; it was some time ago.

Q. Did you give the aggregate of that account, or did you select out such items as *secured* to you?

Ans. I don't understand what you mean, whether I gave the aggregate or found the expenses.

Q. Whether you gave the aggregate between the dates, or
932 whether you only selected out items between the different dates?

Ans. In making the estimate of expenses I gave the whole account.

Q. Have you got the statement?

Ans. Yes, sir; I went over it in detail to find out what the items were as much as possible.

Q. What I want to know is this, whether you gave all the items in the ledger between the different dates in making up your accounts?

Ans. In making out the accounts for 1870, from the 9th of November to the end of the year, I found out the expense for the whole year, and got the proportion by making it as 52 days is to 365 days. I did not take it from any particular date.

Q. For 1871, did you take in all the items of the account in the whole year of 1871 in making up your statement, or did you only take part of the entries in 1871, making up your statement?

Ans. I took all the items.

Q. Your footings, then, agree with the footings in the banks?
933 Ans. Yes, sir.

Q. Is not there a discrepancy between your statement and the books, the printing and the paper account in the books; how much between those dates?

Ans. $49,796.80 for 1871; 1870 the total is $33,974.97; 1872 the total $55,342.09; $76,090, that is the pro rata for '70 & '72.

Q. You have figures on this memorandum here of $67,289.13; look at the memorandum?

Ans. I think those are the items which are mentioned in the books as printing and paper literally, with the exception of Wiebusch's bills, without stating what they are; testified as to that when my memory was fresh. There were some items in here not designated as printing and paper, and I put it in so—freight on almanac, &c.

Q. Did you take out a considerable amount of bills in making up the printing and paper account?

Ans. I did in the profit and loss account. In making this state-
934 ment, I tried to find out what was printing and paper according to the books.

Q. The items, then, included in the account of printing and paper, where it did not appear from the face of the account, you excluded.

Ans. They came under the head of some other expenses. I did not exclude them from making up the expenses.

Q. In what account did you include them?

Ans. In all my accounts of profit and loss. That was required to find out what was literally printing and paper, and I gave the details in order to find it out as much as possible.

Q. In your examination you excluded such items as did not appear on the face of the books from the accounts—what they were?

Ans. I did from the printing and paper account.

Q. In point of fact, they may properly belong to the printing and paper account?

Ans. Yes, sir; they are part of the expenses; I considered them
935 so all along.

(Counsel for respondent offered in evidence a certified copy of the printing and paper account.)

Q. Turn to the expense-account. On what page do you find the expense-account?

Ans. Pages 72, 73, 74, for the years 1870, 1871, and 1872.

(Counsel for respondent offered in evidence a certified copy of the account in the books for 1870, 1871, and 1872, and a certified copy of the same account from November 9th, 1870, to May 21st, 1872.)

Q. Turn to the stamp-account. On what page does the stamp-account begin?

Ans. Page 82.

(Counsel for respondent then offered in evidence a certified copy of the stamp-account from November 9th, 1870, to May 21st, 1872.)

Q. Look at the ledger and see if there is a discount account?

936 Ans. Interest, exchange, & discount, pages 84, 85, 86.

Q. Did you examine that account with a view to obtain the results you arrived at; is there another discount?

Ans. Yes, sir; discount on merchandise.

Q. Did you examine that account?

Ans. Yes, sir; pages 550, 551, 552, 553, 554, 555, 556, for the years 1871 and 1872. In 1870 it was entered directly into the merchandise account.

Q. Did you examine that account in arriving at the result you attained?

Ans. Yes, sir.

Q. Did you give an abstract of that account or the footings of the account?

Ans. No; it is part of the merchandise account, and was carried into the merchandise account before it was balanced. It decreased the merchandise account that much. It was carried to the merchandise account and that balanced to profit and loss.

Q. And you made a deduction from the profits of the amount of the discounts?

Ans. Yes, sir; the same as the books have been kept.

Q. And so diminished the profits that way?

937 Ans. Yes, sir.

Q. Deducted from what?

Ans. It was deducted from the merchandise account, carried into it before it was balanced, otherwise the merchandise balance would have been larger than I gave it.

Q. You adopted the figures from the books?

Ans. Yes, sir.

(Counsel for respondent offered in evidence a certified copy of the discount on merchandise account.)

Q. Will you turn to the movable stock account?

Ans. That is on pages 102 and 103.

Q. You examined that account?

A. I did not examine it fully in detail, but I examined it enough to find what it was, and I took his balances.

Q. In making your estimate you took the balances as they were found on the books?

Ans. Yes, sir.

(Counsel for respondent offered in evidence a certified copy of
938 the movable stock account from November 9th, 1870, to May 21st, 1872.)

Q. Look at the advertising account?

Ans. That is page 80.

Q. What is the amount of the advertising account?

Ans. 1870, $40.09; 1871, $65.50; 1872, $1,850.25.

At this point the further hearing of the case was continued until to-morrow at three o'clock.

NOVEMBER 5TH, 1874.

Pursuant to adjournment, the hearing of the case was resumed as follows:

D'r JAMES H. McLEAN recalled on the part of the respondent.

Q. (By M'r Reber.) Look at the book you have before you, and state what it is.

Ans. That is my ledger, and this is the printing and paper account.

Q. On what page does the printing and paper account begin?

Ans. On page 54.

939 Q. Is that the same ledger and the same account that M'r Driggs referred to in his testimony yesterday?

Ans. Yes, sir.

Q. When does that account begin?

Ans. June 1st, 1870. Printing and paper account.

Q. Look from that date to the 22nd of May, 1872?

Ans. That is on page 57—ends on page 57—extends from 54 to 57.

Q. Have you examined the items of that account?

Ans. Yes, sir.

Q. State whether the items of that account are properly chargeable to the printing and paper account?

(Counsel for complainant objected to the question, as calling for the opinion of the witness.)

Q. I will ask you if, from November 9th, 1870, to May 22nd, 1872, it is a correct account?

Ans. Yes, sir.

Q. Look at the item under Aug. 5th, 1871?

Ans. Union Sign Works.

Q. What is the meaning of that?

Ans. They are the signs we use for the purpose of posting up about.

940 Q. August 5th, 1874, Union Sign Works, $96.55?

Ans. It is the Union Sign Works here in this city.

Q. What do you say is the meaning of it?

Ans. Signs for medicine, to hang up in drug-stores or in any place we wanted to.

Q. Look at the item December 30th, 1871, tin signs?

A. December 30th, 1871, tin signs, $1,777.80.

Q. What is that charged for?

Ans. Charged for tin signs. For this kind of sign (producing tin sign), to post up on trees all over the country or in stores.

Q. You mean signs advertising the medicines?

Ans. Yes, sir; pills and other medicines.

Q. Universal Pills?

Ans. Yes, sir.

(Counsel for respondent offered in evidence the tin sign last referred to, and it was marked "Ex. Z 2.")

WITNESS. I have larger ones than those. We have all signs
949 we need of that kind. We make them very much larger than those. That is a sample of tin signs.

Q. Where is this used?

Ans. That is used in the same way; that is what we call a paper sign.

Q. Is that in the other item you mentioned?

Ans. No; that was glass signs.

(Counsel for respondent offered the paper sign in evidence, and it was marked "Exhibit Z 3.")

The MASTER. Are these signs for the Universal Pills exclusively?

Ans. No; they are for all of my medicines.

Cross-examination:

Q. (By M'r Gray.) You have said, doctor, that this account is correct?

Ans. Yes, sir.

Q. What do you mean by that?

Ans. I mean the items charged there were for printing and paper and freighting the almanacs to the journey's end.

Q. Don't you mean that all the items charged there are items that have been paid out?

Ans. Yes, sir.

942 Q. Do you mean to say they all have been paid out in connection with your mercantile and medicine business?

Ans. I mean to say for the almanacs.

Q. Do you mean to say that all the items charged in that account have been paid out for your mercantile or medicine business?

Ans. Yes, sir; it has been in my medicine business.

Q. Did you make the charges?

Q. Were not some of these charges made when you were in Europe, California, or the East?

Ans. I think not.

Q. Do you mean to say you know of your own knowledge that all of them are properly charged?

Ans. Of my own knowledge, I think all of them, as I pay out every dollar paid out of the establishment.

Q. When you were in Europe did you pay them out?

Ans. No; I look over, and the cash corresponds with my addition in the bank.

Q. You pay out all?

Ans. I do.

943 Q. Did you when in Europe?

Ans. No, I look over.

Q. All you know about it is what you learn about it now?

Ans. Well, by experience.

Q. Well, I ask you have you paid out each and all of those items?

Ans. I don't think I have, personally.

Q. Have any of them been paid out by other parties in your absence?

Ans. I think so, the latter part of May they were paid out.

Q. Don't you know?

Ans. I know when I am not home they are paid by M'r Taylor.

Q. You have only stated the correctness of this account from November 9th, 1870, down to the 21st of May, 1872?

Ans. 22nd of May; yes, sir.

Q. You speak of the account closing May 21st?

Ans. I am not positive of that. It would be naturally so. I am not positive whether I closed the account on May 22nd.

944 Q. Then it is true that such items as are there charged in your account, that were paid out during your absence, your knowledge of them is only what you have been informed?

Ans. And what I am doing every day.

Q. What do you mean by that?

Ans. Because these items—for instance, take one item to Hoover, of New Albany; I never paid him freight except for almanacs.

Q. Do you know of your own knowledge that each of these items have been paid out?

Ans. No, I do not.

Q. What are these pages—these figures?

Ans. These are items from the journal or cash-book. If it was cash paid out it is from the cash-book.

Q. Will these entries on the pages referred to show what the items are?

Ans. I don't think it would. If I pay it to Hoover, it would say Hoover, New Albany, Indiana, freight.

Q. Do they all show what the payments are for?

Ans. Yes, sir; every one of them.

945 Q. You have stated that these sums you mention as paid for signs of various kinds were signs for all your medicines?

Ans. Yes, sir.

Q. Could you tell how much of these charges were paid for signs for the Universal Pills?

Ans. No, sir.

Q. Could you as to other of the items for glass signs or tin signs?

Ans. The glass signs had all of my medicines on them.

Q. Could you tell how much of these charges were paid for Universal Pills?

Ans. One fifth of all of them.

Q. I simply ask you if you can say how much of this $96.75 was paid for signs for Universal Pills?

Ans. No, sir.

Q. How much of the $1,770 was paid for signs for the Universal Pills?

Ans. No, sir.

Q. Is that true in reference to all the items in this printing & paper account that you can't tell how much was paid, particularly on account of the Universal Pills?

946 Ans. Yes.

Q. Is that true of the expense account?

Ans. Yes, sir.

Q. Is that true of the movable account?

Ans. Yes, sir.

Q. Is that true of the merchandise account?

Ans. Yes, sir.

Q. And the advertising account?

Ans. Yes, sir.

Q. Referring to page 72 of the ledger, expense account, there is an item June 30th, 1870, sundries, $702.75. What were these items?

Ans. I don't know what these sundries are.

Q. What does the figure 4 refer to?

Ans. To figure 4 in the journal.

Q. Would the entry there show what the items are?

Ans. Yes, sir.

Q. Is that true of all the entries through the expense account?

Ans. Yes, sir.

Q. By referring to the journal the items can be ascertained?

Ans. Yes, sir; that is what Driggs done; I saw him do it.

947 Q. Do you mean to say all the items in this expense account refer to your mercantile or medicine business?

Ans. Yes, sir.

Q. Everything?

Ans. Everything; I have nothing but medicine business and my personal account.

Q. You have real estate, haven't you?

Ans. Yes, sir; but it is charged with its own things. Look there (referring to book), and you will see each piece is charged with its own business.

Q. Your statement is, that all the items in the account refer to your mercantile business.

Ans. Yes, sir.

Q. I see here M. L. Gray, attorney's fees, $260.

Ans. I really don't know what it was for. I think it was on my medicine business.

Q. Was it not in reference to the partition, Fourth & Olive?

Ans. There was one part.

Q. Was not there a suit for dower, M'r's Kennedy?

Ans. Yes, sir; that was in 1870, long previous to this suit.

948 Q. Don't you remember it was in reference to the land suits, one in partition and one M'r's Kennedy's? Do you remember how that was?

Ans. I know you were attorney in these cases. You see I put all my rents and everything like that job into my business, each piece of property; and an item of that kind might get into expense account when it was chargeable to the property.

Q. Under the date of December 31st, 1870, repair account, $254.70; what is that?

Ans. I will see what it means. It refers to 148.

Q. This stands here in the expense account.

Ans. Yes, sir; it is repairs to my building.

Q. Do you call it as part of your expenses to your medicine business?

Ans. I do, most emphatically.

Q. If you had bought a new building would you call it a part of the expenses of your medicine?

Ans. No, sir; but if I put it out of repair and get it dirty, I

949 think I ought to fix it.

Q. Did you consider it would be a part of your mercantile business?

Ans. Certainly.

Q. Under date of September 18th, 1871, there is an entry "hoisting apparatus," $365.00?

Ans. That was in my store.

Q. You have got it there now, have not you?

Ans. Yes, sir: it is necessary to the business.

Q. How was it constructed; was there a change in the building to construct it?

Ans. I moved from the fourth to the fifth story. I abandoned my old elevator and got a new elevator.

Q. Is this the old one or a new one?

Ans. The new one; it has elevator wheels.

Q. It is part of the structure?

Ans. No; it is part of the business. It is to hoist articles from one floor, to move them.

Q. How do you use it?

Ans. With pulleys; use it by hand with ropes.

950 Q. It is attached to the building?

Ans. Yes, sir.

Q. Forms part of the building?

Ans. Yes, sir.

Q. May 9th, 1871, to Harvey & Tylor, for Cabarel Island; what is that for?

Ans. I really can't tell what that is without looking at it. I can tell about that. I can look and see.

Q. Do you know what it is for?

Ans. No, sir.

Q. May 13th, 1871, F. Hoefel, for sunset, $50.00; what is that for?

Ans. I could not tell you.

Q. Can you ascertain?

Ans. I think so.

Q. Under date of May 31st, 1871, sundries, $1,028.20; do you know what that was for?

Ans. No, sir.

Q. Can you state as to any of those that are entered here as sundries, what they were entered for?

Ans. No; not without looking at what they are for.

Q. July 6th, 1871, J. H. McLean, to Trenton, Georgia $150.00; what is that?

Ans. On account of business trip.

951 Q. Nov. 1st, 1871, D. R. Smucker, $40.00; what is that for?

Ans. I don't know; I think it was a coat I gave to one of my travelling agents. I gave him one.

Q. Do you think that was it?

Ans. I could not tell you without examining.

Q. August 8th, 1871, D'r McLean's expenses to California, $3,000.00?

Ans. Yes, sir.

Q. That was the expense of a trip to California.

Ans. Yes, sir.

Q. Yourself alone?

Ans. Myself and wife. I only made one trip to California. My niece paid her expenses back.

Q. Do you say that credit appears here?

Ans. Yes, sir.

Q. In this expense account?

Ans. Yes, sir.

Q. What is your niece's name?

Ans. Julia Hart.

Q. Here is a credit of $515.00.

Ans. That is not it.

Q. Have you testified about this before?

952 Ans. Yes, sir; my niece gave me the money to pay her expenses when she came back.

Q. That is the $515.00?

Ans. No; she probably paid me afterwards; some time after.

Q. Here is a credit by J. H. McLean, $1,000.00.

Ans. Yes, sir; M'r Driggs traced it up. That is the amount due myself and wife, otherwise he would have had to make a credit and debit there. He would have had to draw the account up.

Q. Here is October 11th, Denver, $50.00.

Ans. That is part of the same expedition. I made a draft and it never came in till that time.

Q. That is to be added to the $3,000.00?

Ans. Yes, sir.

Q. December 9th, 1871, Johnny Taylor, $57.00, and immediately underneath $386.00, marked A B?

Ans. Yes, sir; painter paints signs on fences.

Q. That is what that was for?

Ans. Yes, sir.

953 Q. That don't go into printing and paper account.

Ans. No; it is expenses.

Q. What does A. B. mean?

Ans. I don't know.

Q. Look at it and see.

Ans. It is expenses; Johnny Taylor and his expenses.

Q. What does A. B. mean?

Ans. I don't know; we gave him that to get out; $386.00 is what he got in full of the trip. That is the amount we paid him at various times; that is summoned up of the full trip.

Q. Do you know how it is?

Ans. Yes, sir.

Q. Did you pay him, or did he draw on you?

Ans. I paid the first portion of it in money; gave him that to start with; that is the way it was.

Q. December 18th, Schureman & Co., sprinkling, $82.00; where was that sprinkling?

Ans. In front of my house, and my store.

Q. Was any part of it in front of the store?

Ans. Yes, sir.

954 Q. What part?

Ans. $2.50 a month.

Q. What proportion of the whole charge was it?

Ans. $2.50 a month for seven months.

Q. Then it would be $17.56 belonging to your store?

Ans. Yes, sir.

Q. And the balance belonged to the house?

Ans. Yes, sir.

Q. The furniture account, you have been examined as to that?

Ans. Yes, sir.

Q. $1,121.90; you have stated that was at your house?

Ans. Yes, sir.

Q. The same date, December 30th, 1871, sundries, $937.40; what was that for?

Ans. I don't know unless I see the account.

Q. It refers to 60 in this book.

Ans. Then it refers to the journal.

Q. You don't know what the item is, I understand you?

Ans. No, sir.

Q. You think the journal will explain it?

955 Ans. Yes, sir.

Q. As it would all the items?

Ans. Yes, sir.

Q. The donation account you have been examined about, haven't you?

Ans. Yes, sir.

Q. Here, under date of May 31st, 1872, is an entry—J. H. McLean, to Europe, $160.00.

Ans. That is all summed up.

Q. Premium on gold June 20th, $2,700?

Ans. Yes, sir; they all came in one after the other.

Q. What time did you get back from Europe?

Ans. I got back in September; some time between 15th and 20th.

Q. August 18th, 1872, J. H. McLean, referring to page 86, $750.00; what is that?

Ans. I think that is some purchases I made in New York. I made some purchases prior to going away, which was included in the expense to Europe.

Q. Will you swear it was for purchases—the $750.00?

Ans. No, sir.

Q. Do you know what it was for?

956 Ans. I do not know.

Q. What were the purchases you made in New York?

Ans. I have forgotten; I always buy some extra thing in New York when I go there.

Q. What do you mean by extra thing?

Ans. Some things I can buy at a bargain.

Q. What do you mean—jewelry?

Ans. No; merchandise I bought for myself.

Q. If it was for merchandise, tell us what it was.

Ans. I can't recollect what it was, for I shall have to look at the journal.

Q. If it was for articles purchased for the business it would go in the merchandise account?

Ans. No; for my little item merchandise account I have none; all my purchases are made from parties I sell to. Valle owes me $1,000.00 for goods, and I buy $30.00 worth from him.

Q. If it was for goods purchased for your business would it not go in your merchandise account?

957 Ans. No, sir.

Q. Your merchandise account don't represent all the purchases?

Ans. It is amount on hand and sales of merchandise.

Q. Does this expense-account here cover what you pay for goods you buy?

Ans. No; it don't begin to.

Q. What account covers that?

Ans. We have no account of that. We buy all these goods from the purchasers we sell to. There is no account made up of that. If it is a special purpose there is an entry made of it.

Q. Where is it entered?

Ans. It is entered probably in the expense-account.

Q. Then the expense account does cover the purchases of your materials?

Ans. No, sir.

Q. It contains part of it, does it not?

Ans. No, sir.

Q. Then this is an item of merchandise?

Ans. It may be part of it.

Q. Why should it come in here if you did not put other merchandise here?

958 Ans. Because it might be an instrument, or tool, or something of that kind, for my business, or a machine.

Q. The charge is August 18th, J. H. McLean, June 25, 27, 29. If I understand you, you can't tell what it was for?

A. No, sir.

Q. It refers to 86; you could ascertain by examining that.

Ans. Yes, sir; I will go to work and make out this statement, if you will make out your list, if the master wants me to make it out.

Q. October 11th, expenses, D'r J. H. McLean, Exchange Bank of Commerce, $63.35.

Ans. That is connected with the other account—trip to Europe.

Q. Have you explained about that?

Ans. Yes, sir.

Q. The item in this account, Bank of Commerce, $2,138.10?

Ans. Yes, sir; he summed it all up together. You are taking them out separately.

959 Q. November 9th, 1872, D'r J. H. McLean's expenses to Europe, $200.00.

Ans. That is included.

Q. December 31st, sundries, $1,392.68; can you tell what that is for?

Ans. No; I think you will find the sundries account in that book. No, it is in the journal.

Q. July 5th, 1870, in the stamp account, on page 82 of the ledger, is the item to income-tax.

Ans. That is right. That was asked me before. I told you it was my profit on my business.

Q. On what was that income-tax paid?

Ans. On the income of my business.

Q. Is that all?

Ans. Yes, sir.

Q. Is it not paid on your income from real estate?

Ans. All my rents go into my business. It is my business. Every dollar's worth of rents go into my business.

Q. Don't you know you were required to make returns of your rents?

Ans. Yes, sir; I made returns of my rents.

960 Q. Is it not in part from your income on real estate?

Ans. It is my net income.

Q. Did you not, in adding your income, add your rents?

Ans. I had to give an account of my rents and my expenses.

Q. Let me ask you if you did not have an account of your rents?

Ans. Yes, sir.

Q. July, 1871, to cash, income-tax, $661.57; is not that a tax on your rents, income from real estate, as well as from your business?

Ans. In all my business my net income after paying all my expenses.

Q. To get at your income you had to state an account of your rents?

Ans. Yes, sir.

Q. So both items here of income-tax is from your medicines and real estate?

Ans. It is all profits of my business.

Q. I want to know whether it is rents from real estate.

Ans. Yes, sir; all goes into the general business; into the general pool.

961 Q. In making up that account did you not render it as the United States officers required it?

Ans. Yes, sir.

Q. Did you so state it?

Ans. Yes, sir.

Q. And they allowed you expenses and taxes?

Ans. Yes, sir.

Q. And in making that account you charged rents received?

Ans. Yes, sir; every dollar went into the business. Out of the rents & this business the profits came out.

Q. To get at your income you gave in a statement of your rents received?

Ans. Of all my income received; the same for trading a horse; all the profits went in the business.

Q. Do you deny you made a statement of rents?

Ans. Yes, sir.

Q. Did you pay an income-tax?

Ans. I did, on rents received.

Q. Did you pay any on your rents?

Ans. Rents included in my business.

Q. Did you pay an income tax on your rents?

962 Ans. I paid on rents.

Q. Did you pay an income-tax on income received from real estate?

Ans. It is precisely this: Every dollar goes into the business, and out of the business comes the income.

Q. Say whether you paid any income-tax on income from real estate.

Ans. Say income-rents, then I will answer the question yes.

Q. Now, how much for 1871?

Ans. Just as it is mentioned there.

Q. You mean the $665.57, in 1871, is the income-tax you paid on rents?

Ans. On all my business.

Q. I ask you how much on rents?

Ans. I can't tell.

Q. What proportion of your income for 1871 is derived from rents?

Ans. I could not tell.

Q. Can you tell for 1870?

Ans. No.

Q. For 1870 you did pay an income tax on your rents?

Ans. On my rents and other business too.

963 Q. For 1872, July 1st, income-tax, $04.45. Did you pay an income-tax for that year on your income from real estate?

Ans. That with other business; yes, sir.

Q. Do you know how much of this amount of $804.45 was an account of income from real estate?

Ans. No, sir.

At this point the further hearing of this case was continued until two o'clock November 11th, 1874.

NOVEMBER 12TH, 1874.

Parties met pursuant to adjournment, and the hearing of the case was resumed, as follows:

D'r J. H. McLEAN.

Cross-examination resumed:

Q. (By M'r Gray.) I asked you, when under examination before, to look at certain items.

A. I have got them down, June 30th, 1870, sundries.
Q. In what account is that?
Ans. In expense account; cash paid out for expenses; in cash account.
964 Q. You have no copy of it?
A. It is cash paid out for clerks in the store; all expenses of the store; that is the footings.
Q. What do you say the items are?
A. Store expenses; the actual bona-fide expenses.
Q. Does the entry say bona-fide expenses?
A. No; it is a dozen entries; twenty entries from the cash-book.
Q. Are you able to state what the entries are?
A. No; I cannot state all of them.
Q. Wasn't that the thing you were to look up?
A. I was to see what the items were—whether actual expense or not.
Q. Can you give the items?
A. No, sir; not without the book.
Q. I thought you were to make a copy of the expenses.
A. I gave you a copy of the expenses.
Q. You are not able to state what the items are?
A. No; they are store expenses.
Q. You state that as your conclusion?
A. No; I see it.
965 Q. What I wanted was the item to be given, so we could see.
A. I can send for my cash-book and see them.
Q. What is the next item?
A. M. L. Gray's account; that is your own bill.
Q. What do you find that?
Ans. That is expense account connected with the business.
Q. What was it for?
A. It don't state what it was for.
Q. Was it in relation to real estate or the medicine business?
A. Real estate and medical business—all legal services connected with it.
Q. Can you state which it was, whether real estate of medicine?
A. It was both.
Q. How much in relation to real estate?
A. I cannot state. I did not see the bill. The principal thing was the partition suit of the property on 4th & Market. I had no other suits—no other legal advice. The entry was made to expense account.
966 Q. Can you state how much of it was for real estate?
Ans. I presume pretty near all of it, if there was no division. Your bill came in so much for legal services, $260.00. I believe there were no items about it; that is my recollection about the matter.
Q. Then your idea is the larger part of it was in reference to real estate?
A. I have no doubt about that.
Q. What is the next item?
A. Harvey & Tyler; that was for a picture to adorn my office. Hoefer's was the same. That was to have gone up-stairs in my reception-room, but I took them down and took them to my house; they are there now.
Q. These are items used in your house?
A. In my office as long as I wanted them; in my house the balance of the time.
Q. When did you take them to your house?

A. I could not tell exactly; they are there yet.

Q. Are they engravings or paintings?

Ans. Paintings.

967 Q. If they were purchased for the office, they were subsequently transferred to your house?

Ans. Yes, sir.

Q. Where they now are?

A. Yes, sir; these items are for pictures—$150, the two together: Harvey & Tyler, $100; Hoefer, $50. May 31st, 1871, sundries, $1,028.20; which is a similar account of monthly expenses paid out of the store.

Q. Can you state the items?

A. No; I could not.

Q. Where did you find the entry?

A. I found the entry in the expense account.

Q. Did you find any other entry?

A. The cash-book will show it.

Q. Does that show what the expenses are for?

A. Yes; item for item.

Q. But you cannot state what they were, except you say they were for your business?

A. I can give it to you: it is a very simply thing—monthly expenses; it wouldn't take long. The next item is, August 18th, 1872, $756, J. H. McLean, expense to New York.

968 Q. Your statement before was those were purchases made in New York?

A. I beg your pardon: I never said so.

Q. What is the entry, "$756, D'r J. H. McLean, expenses to New York"?

A. That is all there is of it.

Q. Were you not in Europe at that time?

A. Yes; I think I was; but I think it was among the expenses I had probably paid out of my own pocket.

Q. I thought that was what you said; it was for a purchase.

A. I didn't say that. I don't see why it shouldn't be in the general trip to Europe, and M'r Tyler couldn't tell.

Q. Didn't the entries in the book you referred to show what it was for?

A. No; it says: "J. H. McLean, expenses." We don't individualize any account. Of my owning the entire business, I didn't keep an account of my trip, as my travelers do, and sum up at the end of the trip, and just say so much.

Q. Are you able to state what it was for?

A. No, sir; no further than expenses to New York.

969 Q. Didn't you say the other day you thought it was for purchases made in New York?

A. No; I did not say that. I say it may have been, the entry being divided. That was the time I was in Europe. I see I made an entry when I came back, money received. I charged it all to expenses. Here is the entry made while I was in Europe. "D'r J. H. McLean, expenses to New York." I buy goods, bring the receipts home, and foot it up to expenses.

Q. You are not able to state further than what the entry states?

A. No, sir.

Q. And the entry don't state what it was used for?

A. No, sir.

Q. You cannot recollect?

A. No; and I don't intend to recollect, either. December 31, 1873, $1,392.68; it is in the same category as the other entries. It was the month of December expenses.

Q. Does it include taxes?

A. No; my taxes amount to $8,000.

970 Q. You have not answered the question whether it included any taxes?

A. No; I know it don't.

Q. You are not able to state the items?

A. I can furnish the items in half an hour.

Q. I thought you went to get that.

A. No; I was to state what they were for; that was the way I understood it. It was simply the month's expenses. It is the footings up of each month. I would rather send the cash-book up than a copy.

Movable-stock a/c.

Q. Is this a copy of the movable-stock account?

A. Yes, sir.

Q. Is it an exact copy?

A. Yes, sir.

Q. How do you know?

A. Because I looked at the items. I didn't read them over each one. The footings are the same.

Q. Do you know the items in that account are the same as are on the books?

A. That is my understanding, as near as I can tell. I did not look over them. I did not call them off.

971 Q. You don't know whether they are or not?

A. I know it as well as anything I know that I don't know myself. I could not do it myself. If the footings are alike I don't see what difference it makes.

Q. The second item here, Abbott, Downing & Co., $476, what does that mean?

A. Peddling-wagon.

Q. Have you got it now?

A. I could not tell you. I don't know whether I have or not; it may be all gone and it may not.

Q. Can you tell whether it has been sold or not?

A. No; I sold it off whenever it gets bad.

Q. Is a credit made of it?

A. Yes, sir; the credit is there.

Q. Is there a credit?

A. Yes, sir; there is moveable stock credited with $63.50.

Q. You don't know whether that was sold or not?

A. No, sir.

Q. "January 7th, 1871, A. Schullher & Co., $230"; what is that for?

A. Horses.

Q. How were those horses used?

972 A. In peddling-wagons.

Q. Do you own them yet?

A. I don't believe I own them; it was too long ago; the horses may be dead, or I traded them and got other horses.

Q. Is this account credited with what they brought?

A. No, sir.

Q. Then there is only one side to this account?

A. Yes, sir; it is all loss.

Q. When you sold the horses, or traded them off, you got something for them?

A. No, I traded them off for better horses, and I gave boot. I never allow them to trade and get boot. We probably traded and got another horse.

Q. Was there any entry made?

A. No, sir; that was on the route.

Q. How is this: "Heweel & Johnston, $345, February 14, '3"?

A. That was a wagon.

Q. Have you got that wagon yet?

A. No, sir.

Q. Have you traded it off?

A. Yes, sir.

Q. Did you get anything for it?

973 A. I got $15.

Q. Is it credited here?

A. No, sir; I got it in medicine; the traveling agent came home and spent it before he got home. I never will get anything for it.

Q. You have a claim for it?

A. No, sir; I made him a present of it; he is dead.

Q. "Cruiger & Henshon, $100.25"?

A. Fixing wagons.

Q. What kind of wagons?

A. Peddling-wagons.

Q. How many wagons do you keep?

A. I think we have seven or eight.

Q. How many had you in 1871?

A. I could not tell.

Q. "April 8th, J. Arnott, $500;" what is that for?

A. Horses.

Q. How were those horses used?

A. Like the balance, I guess. I bought several horses from him.

Q. Doesn't this account contain the price of horses you bought for your family use, or carriage use, or haven't they been so used?

974 A. If I bought any horses for carriage use, I bought two horses for carriage use. I bought four horses.

Q. When did you buy them?

A. I could not tell you.

Q. Have you bought any since 1870?

A. I think I have bought five or six.

Q. For carriage use?

A. Yes, sir; and traded back and forth.

Q. Are they entered on here?

A. I don't know; I think they were charged to me personally.

Q. Do you know how the fact is?

A. No, sir.

Q. Will you say they are not charged to you on this account?

A. No; I will not say that.

Q. You can ascertain, can't you?

A. Yes, sir; I can ascertain.

Q. Do you keep any other movable stock account?

A. No, sir.

Q. "April, A. Schullher, $350"; what is that for?

A. Horses.

Q. To what use were those horses put?

A. General use. I have no other use but my own business.

975 Q. If they were used for your house or carriage, will you call that your business?

A. Yes, sir; if I run them back into my business.

Q. When used for carriage purposes they are used at your house?

A. No; I wouldn't call them for my business used at the house.

Q. "15th of April, Jesse Arnott, $757.55;" what is that for?

A. For horses; buying and selling horses all the time. I bought several horses from Arnott and Schullher.

Q. Don't your "movable stock account" show what they were for?

A. No, sir; because I mix my carriage-horses with my peddling-teams. If a horse don't suit I send him off with a peddling-wagon.

Q. What I want to get at is whether, when you bought horses for your own account, whether they are entered here?

A. I don't know; they ought to be. I am riding one now I use in my peddling-team. When the time comes he goes into my peddling-team.

976 Q. You mean to say that your carriage-horses are in there, & if they are, they are properly part of your business?

A. No; I don't say they are there.

Q. Do you mean to say it is part of your business?

A. Yes; I used them that way.

Q. Then they are unquestionably in here?

A. No; I cannot tell unless I ask my bookkeeper and *found* out when I bought them.

Q. You can ascertain that?

A. Yes, sir.

Q. "May 30, A. Schullher;" do you know what that is for?

A. A team.

Q. You remember that purchase?

A. No; I know it because I bought a team from him.

Q. You mean horses?

A. Horses & mules, both.

Q. Which was this, horses or mules?

A. I cannot tell.

Q. How were the horses and mules used?

A. If used, used directly in the peddling-wagons.

977 Q. You say they were used in connection with your business?

A. Altogether, yes.

Q. "June 1st, Hanson & Hertz, $3.50"?

A. Fixing harness, probably.

Q. How do you know it?

A. I know it because that is what he does; it is the men I am dealing with now.

Q. "Albert Downing & Co., July 10th, 1871, $473"; what is that for?

A. Wagon; peddling-wagon.

Q. Where do they live?

A. Concord, New Hampshire.

Q. "July 11, Railway Supply Company, $21.75"?

A. That is lamps for peddling-wagon.

Q. "October 3d, G. M. Malson, $100"; what is that for?

A. Horses, I presume. I cannot tell; maybe a horse trade, trading off a horse.

Q. You can't tell what it is?

A. I know what it is, for Malon is a horse trader, and I wouldn't have

anything to do with that except to trade horses. My horse was worn out; he took it and gave me $100 to boot.

978 Q. "Cruiger & Henson"?

A. Fixing wagons.

Q. What does that credit of March 18th, 1872, by William Higgs, mean?

A. An old wagon I sold.

Q. Then the only horses and wagons then sold on this account from the 9th of November, 1870, to May 22nd, 1872, is one wagon?

A. Yes, sir.

Q. Since you may traded off other wagons and horses?

A. Yes; I bring home a horse, and I go to a trader and say, "Here, give me a horse, and I will give you $100 boot." I go to Malon and do that.

Q. Do you at the end of the year, or at any time, take account of your movable stock?

A. Yes, sir.

Q. When?

A. At the end of the year.

Q. When you take the account you put it down to certain figures?

A. Yes, sir; we estimate them all.

Q. Suppose a loss has occurred during the year, what do you do with it?

A. We always know there is a loss; we don't estimate it.

979 Q. At the end of the year you take account of it?

A. Yes.

Q. You put it down at the same figures?

A. Yes, sir.

Q. You ascertain whether there is a loss on it, and how much?

A. Yes, sir.

Q. What do you do with the loss?

A. Charge to this account.

Q. Is it charged anywhere else?

A. No, sir; that would be carried directly to expense account, expense of running the business.

Q. Then it would appear twice?

A. No, sir.

Q. It would appear here what you paid for it, and also in the expense account?

A. So much loss to movable stock account.

Q. At the close of this period, the 21st of May, 1872, how much of this movable stock did you have on hand?

A. I couldn't tell you.

Q. Did you keep it up or did you let it run down?

980 A. We try to keep it up. Henshon was keeping it in repair all the time.

Q. What do you say was the loss on that account, if any?

A. The loss, according to this, is $4,950. I can't tell you what the loss would be unless I see what was on hand, and deduct from that or make an estimate.

Q. How much did you charge as loss on movable account when you took the stock at the close of each year?

A. It will be shown in the book there; the bill then will show. I couldn't tell from that account. (Paper handed to witness.)

Q. How much?

A. $861.63.

Q. For the whole time?

A. Yes, sir; five times that much would bring the total amount. It is divided by five for a portion of the year.

Q. What is the total loss from the 9th of November, 1870, to May 22nd, 1872?

A. 5 times $861.63.

Q. You say that much is loss?

A. Yes, sir.

Q. This account shows what—this movable stock account?

A. $4,950.17.

981 Q. What is that intended to represent?

A. What is paid out for stock during this time; what is paid out for stock and harness, and things connected with movable stock.

Q. You had that stock on hand at the end of that time?

A. Yes, sir; a portion of it.

Q. Still you mean to say on that account, that there was a loss of over $4,300?

Q. Yes, that was loss on what we had on hand prior to that; losses incurred year after year.

Q. You start in with a certain date, and take things as they are?

A. Yes, sir.

Q. And charge up what you paid out after that date, to May 21st, 1872?

A. Yes, sir.

Q. And then you drop it?

A. Yes, sir.

Q. But still you have kept your stock up to the valuation you started with?

A. Yes, sir; that is what the losses are, $4,000; that is, loss in keeping it up, buying new wagons when the old ones wear out, and new horses.

982 Q. You had at the end of that time the same amount of stock as when you started?

A. Yes, sir.

Q. The number of wagons, harness, animals, and everything of that kind?

A. Yes, sir.

Q. Where will the value of the stock you had on hand appear?

A. Nowhere.

Q. You say that is the amount expended for stock between those dates?

A. Yes, sir.

Q. And it has been kept up?

A. Yes, that is what it is for, that is loss.

Q. You have paid to keep up your wagons and horses, $4,800 between those dates, one and a half years, and you say the loss by your account, the amended account, is $4,308.15?

A. Yes, sir.

Q. What is the value of the movable stock you had on hand on the 21st of May, 1872?

A. We presume it was the same as when we commenced in 1870.

Q. But you don't know what that actual value was?

983 A. No, sir.

Q. Do you know what you valued it at the end 1871?

A. No, sir.

Q. How do you get at the amount of loss?

A. The amount we paid out.

Q. You consider everything you paid out as loss?

A. Everything to increase the teams.

Q. "Jesse Arnott, $750." Was that for a purchase of horses?

A. I presume so. He is a horse-dealer, and I buy horses where I can buy them cheapest.

Q. Do you mean to say everything you paid out between those dates are losses?

A. Yes, because they are to keep up the teams as they were at the date we commenced.

Q. You have the stock on hand?

A. Didn't I have it on hand when I commenced?

Q. You consider everything as loss you pay out for stock?

A. Provided it is not increased.

984 Q. Whatever you pay for a wagon or horse is loss?

A. If I buy a team and send it out with a wagon, and a horse gets home and the other is lost, I have to buy another one, and then the team is the same as before.

Q. You value your horses at the end of each year?

A. Yes; if we keep that team we value it as of the year previous.

Q. On the book is not this item of July 17th, 1871, of $661.57, entered there as income-tax or internal-revenue tax?

A. No; it is just marked there as cash.

Q. Don't you remember it?

A. No; I don't remember whether it was so or not.

Q. Didn't I ask you about income-tax the other day?

A. Yes; but I don't remember. We can bring up the books and call them off. I told the clerks to make an exact copy of them.

Q. Here is an "exchange, interest, and discount" account.

A. Yes, sir.

Q. Will you look at it?

A. Yes, sir. (Paper handed to witness.)

985 Q. Is that a copy from your books?

A. Yes, sir.

Q. That is what you tender here?

A. Yes, sir.

Q. In regard to the items on this account, I wish to ask if they all relate to your medicine or mercantile business?

A. Yes; I have no other business; they would be naturally in my business.

Q. As a matter of fact, what do you state as to whether those items referred and all belonged to and are a part of your medicine business?

A. Yes, sir.

Q. Have you examined it?

A. Yes; I looked over the items by item, just as they are, not to single out any item at all.

Q. If you have not examined it, how do you mean to be understood that it relates to your business?

A. Because I know the names of the people, and I know I am dealing with them directly in my business.

986 Q. "June 26th, 1871, bills payable 4th and Market, $3,450.00"?

A. Yes; bills payable.

Q. "4th and Market"; what does that mean?

A. I own the corner of 4th & Market.

Q. What does that mean?

A. I don't know.

Q. Does it mean bills payable in relation to that property?

A. It means bills payable according to that, to the property. I never paid that amount. I paid $17,000.

Q. Don't it relate to the property on 4th & Market streets?

A. Yes.

Q. Then that don't relate to your medicine business?

A. I could not tell you how it would. I don't know that it would relate to it.

Q. Do you say it relates to your business of medicine?

A. I don't know.

Q. What do you say in relation to the item of $3,450? Look at it.

A. According to that it would be payable to 4th & Market, or 4th & Market had paid a certain amount of money.

987 Q. Did 4th & Market pay it, or was it paid for 4th & Market?

Ans. I presume it was paid for 4th & Market.

Q. Then that is an item that don't belong to your medicine business?

Ans. Yes, it does.

Q. How?

A. Because if I took the rent and put it into the business——

Q. I am not asking you about the "ifs."

A. I can understand it if it is interest I paid on notes.

Q. I object to the "ifs" about it. If you can tell as a matter of fact, go on.

A. I can't explain it.

Q. "1871, July 8th, stamps for deed of trust, $47.50"?

A. Yes, sir.

Q. Does that relate to your medicine business?

A. No; it may not be. I don't know in what deed of trust it was.

Q. What do you say, whether it does or does not relate to your medicine business?

A. It all relates to my medicine business.

988 Q. Did you ever give notes for purchases you made for your medicine business?

A. Yes, sir.

Q. For merchandise?

A. No; it was not in merchandise account.

Q. Did you ever give a deed or trust on property of any kind for goods or any purchases made for your mercantile or medicine business?

A. No, sir.

Q. Then the stamps cannot relate to your medicine business?

A. No; because the rent of that property went into my medicine business, and it is properly my medicine business. If I have a business of one hundred thousand dollars, and I choose buy property for $25,000, and put a deed of trust on it, and take the rents and put them into my medicine business, I don't separate it at all from my medicine business.

Q. Do you say that as a matter of fact?

A. Yes; because everything goes in.

989 Q. That brings all of your real estate?

A. No; it does not.

Q. Then you swear this item of July 8th, 1871, stamps for deed of trust, $47.50, is part of your medicine business?

A. It belongs to a part of my medicine business.

Q. Do you swear it is a part of your medicine business?

A. I won't say your words; I will say just what I say.

Q. What was the deed of trust on?

A. I couldn't say.

Q. Was it on the property on 4th & Market?

A. I could not tell you.

Q. Without following the items through, I have asked you the question whether this "exchange, interest, and discount" account relates to your medicine business?

A. Yes, sir.

Q. All the items?

A. All the items.

Q. On both sides of the account?

A. The way understand it.

990 Q. What do you say?

A. I don't know the credits and debits. I only know what interest I paid for my business, and what discount I paid for my business. I don't know an item here not chargeable to the business account.

Q. Your statement is that the whole account relates to your business?

A. Yes; all relates to my business.

(Counsel for complainant then offered in evidence exchange, interest, and discount account, consisting of four sheets of paper.)

Q. Will you look at discounts on merchandise—merchandise account—and state whether that is a transcript from your books that you offer here in place of the book itself?

A. That is my understanding, sir. If there is any mistake we can go over it at any time, that is my understanding. I don't think there is any mistake.

Q. Is not the result on the sum of money of this account carried into the merchandise account?

A. I think it is, sir. I will just look and see. I can't tell by that paper.

991 Q. I have not shown you the printing and paper account. Look over that. (Paper shown.) Is that what you offer here as a copy?

A. Yes, sir.

Q. Between what dates does that account run?

A. From November 10th, 1870, to May 22nd, '72.

Q. Have you furnished here a copy for the full years 1870 and 1872?

A. I thought this was altogether. That was my orders, to put it there. I didn't look at the dates particularly.

Q. You have not furnished any other copy of the account except that?

A. No, sir.

(Counsel for respondent said the account they had offered was from November, 1870, to May, 1872.)

Q. You have not here any copy of the whole amount for 1870 and 1872?

A. No, sir.

Q. Do I understand you to have failed to put in a copy of that account for the whole year 1870 & 1872?

A. I don't know how much we did put in.

992 (The witness makes a memorandum of different accounts to be printed.)

At this point the examination was adjourned until Saturday, Nov. 14th, 1874, at 9 o'clock a. m.

S'T LOUIS, MO., *Nov. 14th*, 1874.

Met pursuant to adjournment.

D'r J. H. MCLEAN was re-examined by the respondent's counsel, as follows:

Q. (By M'r Reber.) There was an account given in evidence at the last sitting, headed "Exchange, interest, and discount," and, if I am not mistaken, you stated in reply to questions put to you by the plaintiff's counsel that that account related to your medicine business?

A. Yes, sir.

Q. That the whole amount related to your medicine business?

A. Yes, sir.

Q. Have you any explanation or qualification to make of that answer, or any addition to make to it?

A. I will explain that the debtor portion of this account is
993 strictly losses arising from my business itself as a whole. It seems that I have made on notes and bills receivable, all that the credit portion of that. It is all in the business but the credit portion of the notes, the interest from notes and bonds in my possession, the credit portion of the notes; it all goes in the business, all of the business, and has nothing to do with the profits that arise from the business in those years; that is, the debit portion would arise in the years that they would be called out in, but the credit portion would not be, because these bonds have been in my possession 10 or 12 years, and loans connected with that would arise from the same item. I have marked it here by a pencil-mark of this description, is personal, which would be from notes and money loaned outside of my business, and yet it all goes in the business as profit of the business.

Q. You mean you put all the money in the business?

A. Yes; rents and all. There is an account which I have of
994 rents that also has gone in the business, and the credit portion would be larger than the debit portion, because I put everything in my business. I have only one business, and as fast as I get money from notes or bonds or whatever I have it goes right in the business, and I have marked it "per."—personal, which would be from notes & bonds, but where it is marked "B" it would be business. Sometimes a man would pay me interest on notes for having let it go over a little while. That is business. That is all the explanation I wish to make.

Q. You had an income from rents, bonds, and other sources outside of your medicine business?

A. Yes; but it all goes in the medicine business. It is credited and put in there. I merely wanted to explain that account, showing that the credit side would be greater than the debit side. My income should be credited whatever benefit there would be in that matter; should be credited by what I had received outside of the business, a matter entirely personal. I marked that so as to call the atten-
995 tion of the master to it when he overlooks the account to see what it is. I have marked "per" for personal and "B" for business on the credit portion side, and the other part there would be losses on the business, only I lost nothing on my notes or bonds. Therefore, of course, there would be no charge against that. It would be all credits, and therefore no debits, but the debit side is loss I may sustain on notes on any discount I may make on bills receivable.

Q. (By M'r Gray.) Have you looked over the debit side of this?

A. Yes, sir.

Q. Have you marked on that what is personal?

A. No, sir; because it is all in the business. That is the loss arising from the business; I may pay money, for instance.

Q. I must explain. I won't answer the way you want.

Q. I have a right to have you answer the questions I ask, and then you can explain afterwards. Do you still insist that the bills payable on Fourth and Market st's was part of the expenses of your business?

996

A. Yes; because I used the money in my business. The money on the notes went for my business, and that is the reason that it was charged in that way.

Q. Therefore, because you used the rents from Fourth and Market in your business, you treat that as a part of your business?

A. Yes; it goes into my business as a credit.

Q. Here is a discount April 8th, Obear's note, $17.19.

A. Yes; look at the other side and you will see a credit.

Q. What is that for?

A. Obear gave me his note.

Q. For what?

A. For rents, probably.

Q. Of his place?

A. Yes; you will see the credit on the other side.

Q. Do you say that is part of your business?

A. Yes, sir; I have credited it on the other side.

997

Q. Then where are the rents; on what part of your business accounts do the rents you have got from the building appear?

A. On the other side is the credit.

Q. Please answer my question, where in your accounts, do the rents you received from M'r Obear for that building appear; where are they credited in your business?

A. They came in the business in the rent account.

Q. You have a rent account?

A. Yes.

Q. Has that rent account been presented here?

A. No, sir.

r (M'r Gray, of counsel for complainant, asked that the book containing ent account be produced, and when produced he would offer it in evidence.)

Q. You say, then, that the Obear charge of $17.19 will appear on the credit side?

A. Yes, sir.

Q. This entry April 11, D'r A. Poepcke, $140.85; what was that for?

A. Interest on money; whenever you have done I will explain it.

998

Q. You say all the debit items belong to the business?

A. Yes, sir.

Q. Every one of them?

A. I believe every one of them; I have looked over them carefully.

Q. Now interest, bills payable, S. W. Elliott, $88.05. What is that for?

A. Same thing—for money, that I had in my business, that ought to have been paid to them.

Q. What was the transaction?

A. The transaction was that Elliot had my note, and the interest on that note was that much.

Q. What was the note given for?

A. The note was given for real estate.

Q. What real estate?

A. Real estate notes on the property cor. of Fourth and Market st's. I preferred to pay my notes and interest than to take the money out of the business; I used the money in my business.

Q. The money you gave a note for was used in your business?

A. Yes.

999 Q. Therefore you charged the business with the discounts on the real-estate notes?

A. No; I charged the business with the interest on the notes on the money that should be paid out of the business. That is *is* rulable, I believe, all my transactions that way.

M'r DENISON (of counsel for complainant). We ask that the rent account be brought in.

The REFEREE. I do not understand where the pills are to be chargeable for property of the doctor's outside of the business, any more than they would be on the interest on the doctor's outside bonds. What the doctor means is evident. He has no partner, and no occasion to keep separate his pill business and outside business. It all goes through his bank account, and it strikes me your request is extraneous to the subject of the investigation.

To which ruling the counsel for the complainant then and there excepted.

1000 H. R. DRIGGS, being recalled by plaintiff, testified as follows:

Q. (By M'r Gray.) Will you state what you found to be the total sales of merchandise in D'r McLean's medicine business in the year 1871?

(Counsel for respondent objected to the question. The referee overruled the objection.)

A. $184,516.83 gross sales.

Q. What, according to his books, was the amount expended by him in his medicine business for merchandise during the year 1871?

(Counsel for respondent objected to the question. The referee overruled the objection.)

A. Before answering that question, I would like to state how it is obtained since my previous testimony. I only obtained it by deducting. This amount is obtained arbitrarily, by deducting the amount of profit as I previously found it from the gross sales for the year, which should give the purchases. That is the way it is obtained arbitrarily for

1001 1870, which was $74,012.11.

Q. (By M'r Stratton.) You don't get it from the books?

A. I obtained the gross sales from the books, and the profit from the books since I have seen the books. I have obtained this by deducting the profit from the gross sales which should be exactly correct. In 1871, $62,132.68; 1872, 62,200.20.

Q. (By M'r Gray.) You obtained these results by calculations from entries which you took yourself from D'r McLean's books?

A. Yes, sir.

Q. (By M'r Stratton.) You say you deducted the profits?

A. Profits that I had ascertained before from the gross sales, which would give the purchases, of course. These purchases I did not figure up in detail.

M'r Gray announced the case closed for the plaintiff.

At this point the hearing was adjourned until December 2nd, at 9 o'clock.

December 2, 1874, at 9 o'clock a. m., parties met pursuant to
1002 adjournment.

No further evidence was presented, and both parties declared that they had closed the same.

JOSEPH SHIPPEN,
Master.

Master's certificate.

I, Joseph Shippen, the master in chancery of the circuit court of the United States for the eastern district of Missouri, to whom the within-stated cause was, by an order of said court dated June 4th, 1875, referred to take the evidence and state an account, do hereby certify that in pursuance of said order and upon due notice to said parties, they appeared before me at my office, number 417 Pine street, in the city of S't Louis, at sundry times within stated, and witnesses were produced who are within named and who were respectively sworn by me to tell the truth, the whole truth, and nothing but the truth; and they were examined in my presence and their examination was taken down by a phonographer, and subsequently written out as within presented,
1003 and the signing of said examinations was waived by both parties; the exhibits herein referred to are separately filed, together with sundry accounts and transcripts of the defendant's account-books, all of which are now herewith returned to the court.

JOSEPH SHIPPEN,
Master in Chancery.

MARCH 29TH, 1875.

In the circuit court, eastern district of Missouri.

COCHRAN FLEMING }
vs.
JAMES H. MCLEAN. }

I hereby certify that I have attended as witness in this case before Joseph Shippen, esq., master in chancery, 5 days at $1.50, $7.50.

My services as an expert accountant rendered said master at his request are reasonably worth 25.00; 32.50.

H. R. DRIGGS.

MARCH 29TH, 1875.

1004 H. R. Driggs, being duly sworn, says the facts above stated are just and true.

JOSEPH SHIPPEN,
Master in Chancery.

Stipulation.

C. FLEMING }
vs.
J. H. MCLEAN. }

Before Shippen, master in chancery.

It is agreed between the parties above that the cost of reporting the testimony in this cause before the said master shall be paid one-half thereof by each party in the first instance, and that the total costs of

such reporting shall be reported to the court by the master, and taxed as costs in the suit, and ultimately paid by the losing party with the other costs of suit.

This arrangement shall include the cost of testimony already reported and also that hereafter to be reported in the cause.

July 31st, '74.

M. L. GRAY and
GEO. DENISON,
By M. L. GRAY,
Att'ys for Compl't.
SAM'L REBER,
Counsel for Def't.

1005 And afterwards, to wit, at the March term, 1875, of said circuit court, the following further proceedings were had on Tuesday, March 30th, 1875, to wit:

COCHRAN FLEMING, PLAINTIFF, *vs.* J. H. MCLEAN, DEFENDANT. } 319. (O. S.) In chancery.

This day comes the defendant herein by his solicitor, and files his exceptions to the master's report heretofore filed, which said exceptions are in the words and figures following, to wit:

Exceptions to master's report.

United States circuit court for the eastern district of Missouri.

COCHRAN FLEMING *vs.* JAMES H. MCLEAN. } Equity.

And now at this day comes the respondent above named, by his counsel, Samuel S. Boyd, and excepts to the report herein made by Joseph Shippen, esq., master of this court, to whom this cause was referred by an order of this court, made and entered on the 4th day of June, A. D. 1874, which report bears date the day of March, A.
1006 D. 1875, and alleges as his ground of exception that the said master in his said report erred in not allowing the respondent credit for one-fifth of the gross amount ($76,009.79) ascertained from the books as the "printing and paper account," to wit, the sum of $15,201.95, and in allowing only 4,736 of such gross amount, to wit, the sum of $5,594.32.

SAMUEL S. BOYD,
Of Counsel for Resp'd't.

And afterwards, to wit, at the last-mentioned regular stated term of said court the following further proceedings were had in said cause on Thursday, May 6th, 1875, to wit:

Decree of court.

COCHRAN FLEMING, COMPLAINANT, *vs.* JAMES H. MCLEAN, DEFENDANT. }

The exception of defendant to the report of the master filed herein,

coming on to be heard, and the same having been heard with the arguments of counsel herein, and having been fully considered by the court, the same is hereby overruled and the report of said master is now in all things confirmed; and it is ordered, adjudged, and decreed by
1007 the court that the complainant herein recover of the defendant the sum of seven thousand three hundred and ninety-nine dollars and thirty-five cents, the amount of damages sustained by complainant, together with his costs and charges herein laid out and expended, and have thereof execution.

And afterwards, to wit, at the said last-mentioned regular stated term of said circuit court, and on the day last aforesaid, the following further proceedings were had in said cause, to wit:

Appeal to Supreme Court of U. S.

COCHRAN FLEMING, COMPLAINANT,
vs.
JAMES H. MCLEAN, DEFENDANT.

This day comes the defendant, by S. S. Boyd, esquire, his solicitor, and prays an appeal from the decree heretofore entered in this cause to the Supreme Court of the United States, which appeal is allowed; and it is ordered that said defendant file a bond herein in the
1008 penal sum of ten thousand dollars, with sureties to be approved by the court or one of the judges thereof, on or before the 17th of June next.

And afterwards, to wit, at the said last-mentioned regular stated term of said court, the following further proceedings were had in said cause on Thursday, June 17th, 1875, to wit:

Appeal-bond filed.

COCHRAN FLEMING, COMPLAINANT,
vs.
JAMES H. MCLEAN, DEFENDANT.

This day comes the defendant, by S. S. Boyd, esquire, his solicitor, and presents to the court his bond for appeal to the Supreme Court of the United States, in the sum of ten thousand dollars, with J. S. McCune as surety, which said bond is by the court approved; and it is now ordered that a supersedeas be granted, staying all further proceedings herein; and it is further ordered that the clerk of this court proceed to prepare and certify a transcript of the record and proceedings
1009 had herein, and forward the same to the Supreme Court of the United States.

Which said bond for appeal is in the words and figures following, to wit:

Appeal-bond.

Know all men by these presents that we, James H. McLean and John H. Crane, both of S't Louis, are held and firmly bound unto Cochran Fleming in the full and just sum ten thousand ($10,000) dollars, to be paid to the said Cochran Fleming, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind

ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 17th day of June, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at the March term, 1875, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Cochran Fleming, plaintiff, and James H. McLean, defendant, judgment was rendered against the said James
1010 H. McLean; and the said James H. McLean having obtained an appeal from the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Cochran Fleming, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the 2nd Monday of October, next:

Now the condition of the above allegation is such that if the said James H. McLean shall prosecute said writ to effect and answer all damages and costs, if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

J. H. McLEAN. [SEAL.]
JOHN H. CRANE. [SEAL.]

Sealed and delivered in presence of—
Approved by

SAMUEL TREAT, *Judge.*

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, in obedience to the order of said court, herewith transmit to the honorable Supreme Court of
1011 the United States, a full, true, and complete transcript of the record and proceedings in the within entitled cause as fully as the same remain of record and on file in my office.

In witness whereof I have hereto subscribed my name and affixed the seal of said circuit court at office in the city of St Louis, this 17th day of September, A. D. 1875.

[SEAL.]

M. M. PRICE,
Clerk of said Court.

(Indorsement on cover:) No. 259. James H. McLean, appellant, vs. Cochran Fleming. E. Missouri. C. C. U. S. Filed 19th October, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 259.

JAMES H. McLEAN, *Appellant*, vs. COCHRAN FLEMING, *Appellee*.	APPEAL FROM THE U. S. CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLANT.

SAM'L S. BOYD,

Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877.

No. 259.

JAMES H. McLEAN, *Appellant*,
vs.
COCHRAN FLEMING, *Appellee*.

APPEAL FROM THE U. S. CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI.

BRIEF OF S. S. BOYD, *for Appellant*.

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States Circuit Court, for the Eastern District of Missouri, granting a perpetual injunction against the infringement of the trade-mark of the appellee, and awarding him damages for such infringement in the sum of $7,399.35 together with the costs and charges by him laid out and expended—the trade-mark involved consisting of a label or wrapper used by the appellee upon the boxes of Liver Pills made and sold by him. The facts in the case are these: In the year 1834 Dr. Charles McLane, of Morgantown, Virginia, made and sold Liver Pills, putting them up in wooden boxes labelled "Dr. McLane's Liver Pills." June 19, 1844, Jonathan Kidd, under an agreement with said McLane, began at Pittsburg to make and sell the same pills. In the year 1845 Kidd formed a partnership with John Fleming under the name of Jonathan Kidd & Co. In 1853 Kidd died, and Fleming took the appellee, Cochran Fleming, as a partner under name of Fleming Bros., which firm continued till 1865 when Cochran Fleming retired, the business thereafter being carried on by Jno. Fleming alone up to his death in 1870, whereupon, on the 9th day of Nov. 1870,

Cochran Fleming succeeded under Jno. Fleming's will to all his rights in the business. Up to August, 1847, the pills in question were wrapped in "an ordinary printed label." In that year a new label of a red color, and bearing the title "Dr. McLane's Celebrated Liver Pills," was adopted and used till 1845, when the color of the label was changed to black and other changes also made. This label was used till 16th Oct., 1871, when another change was made and label "exhibit H." mentioned in the decree, was adopted. It further appears that the business of Cochran Fleming and his predecessors in the manufacture and sale of these pills was large, and that the pills were widely and extensively advertised.

The appellant commenced in 1849, at St. Louis, the manufacture of his own proprietary medicines. In 1851 he began to manufacture and sell Liver Pills under the name of "Dr. McLean's Universal Pills," using first a type-printed label in red letters, changing this in 1852 to a lithographed red label called in the decree "Exhibit L." which he used down to 1866, excepting that about 1863 he added to his name the initials J. H. so that the label read "Dr. *J. H.* McLean's Universal Pills," instead of simply "Dr. *McLean's* Universal Pills." In 1866 he changed his label to that referred to in the decree as "Exhibit K." and continued the use of this label till May 21st, 1872, when he adopted a new label, the use of which is found to be no infringement. It appears that the business of appellant was extensive, the amount expended in advertising these pills, and the other proprietary medicines, four in number, made by him was very large. It further appears that the pills of both parties were bought and sold as "McLean's Liver Pills," and "McLane's Liver Pills," both names however being pronounced exactly alike. There is, as is usual in such cases, evidence on the part of appellee that the labels are alike and calculated to deceive, which is met by counter testimony that they are different and unlikely to deceive. There is no testimony that appellant ever undertook to sell his pills as and for those of appellee; all the testimony in this regard being confined to a few instances where, for the purpose of entrapping the appellant and manufacturing evidence,

the agent of Fleming, just prior to commencement of this suit, persuaded parties in several small country towns to write to appellant's establishment for a single box, in four instances for twenty-four boxes of "McLane's Liver Pills," and "McLane's Pills," which orders were filled by appellant's clerks sending "McLean's Universal Pills." The evidence also is full and distinct that both appellee and his predecessors, as early as 1855, were fully advised and well knew exactly what appellant was selling, and the kinds of label he was using, and that up to the 20th of May, 1872, with one exception, no objection was ever made to his use of these labels, and as soon as this objection was made he immediately adopted such a label as, even in the mind of the court below, relieved him from the infringement. This exception was when Jno. Fleming, about 1863, asked appellant to insert before his name on his label the initials of his name, J. H., a request with which he at once complied.

It further appears that as early as 1855 there were several pills called Liver Pills in the market, of a general similarity to appellee's, and that it was customary to use different colored labels upon them, many having red labels. To the report of the master assessing damages a single exception was made by appellant, which together with the whole case is brought up for review by this appeal.

Assignment of Errors.

I. That the Court below erred in finding that the labels "exhibit L" and "exhibit K," or either of them, infringed upon "exhibit H" as set forth in its decree.

II. That the Court below erred in finding that the appellee was entitled to any damages, and in ordering an assessment thereof, and in allowing him costs.

III. That the Court below erred in ordering an account from the 9th day of November, 1870, of the sales of exhibits "L" and "K," instead of from the 16th day of October, 1871, the date of the first use of exhibit "H" by appellee.

IV. That the Court below erred in overruling appellant's exception to the report of the master, which exception was in the following words, to-wit:

"The said master, in his said report, erred in not allowing the respondent [appellant] credit for one-fifth of the gross amount, ($76,009.79) ascertained from the books as the "printing and paper account," to-wit, the sum of $15,201.95, and in allowing only $4,736 of such gross amount, to-wit, the sum of $5,-594.32."

POINTS.

I.

There is no infringement.

The Court below found that our labels, exhibits "K" and "L," were infringements of plaintiff's labels exhibit "H," the decree being somewhat unusual in form, in that it instead of finding infringement generally specified the label upon which the infringement was committed, consequently, in considering the question as to whether there was an infringement we have only to consider the three labels mentioned in the decree as above indicated. Of course in determining this question the labels themselves are not only the sole evidence of what the parties severally used, but also are the best evidence, if not the only proper evidence, as to whether they are like one another, for in this case we admit there is no occasion for introducing so called expert evidence as to their likeness or difference, since the language they speak is plain enough to be understood by any one who will take the trouble to examine them. Bearing in mind that Liver Pills had been sold as early as 1844 (p. 146), that all colors had been used on boxes of such pills (p. 148), that there were at an early day several pills of a "general similarity" with plaintiff (p. 59), that defendant uses his own name clearly printed on each label while plaintiffs use a borrowed name, both names though spelled somewhat unlike, yet pronounced exactly alike, that the pills of

both parties were bought and sold by the name McLean and McLane with the affix "Liver Pills" or simply "Pills;" that plaintiff's own witness, Weber, at top of page 119 says: "It is principally the name which causes them to mistake one pill for the other,"—the truth of which it seems is self evident—it is clear that defendant had a perfect right to use each and all of these things, the name "Liver Pills," boxes to hold the pills, and labels of any color to inclose the boxes—to print or engrave on these wrappers or labels his own name and the words Liver Pills, as indeed is admitted by the decree. The decree merely forbidding defendant from printing these words on "any label resembling or in imitation of exhibit 'H' whether in style of engraving, printing or lettering." In other words, according to the decree, the infringement lies in the *style of engraving, printing or lettering*.

Let us compare the two labels exhibits "H" and "K" in this respect. The first resemblance we find, looking at the top of the box, is a similarity of color, both being dark, but the dark color is produced in the two by quite different "styles of engraving," as a very casual inspection will determine. And as the evidence shows that dark colors had been used before for labels, and indeed without such proof we think it is a fact of too common notoriety to require evidence that it is not unusual to print labels of various kinds on dark grounds in light letters, or the reverse, but that the Court will take judicial notice thereof. (91 U. S. 42.) The next resemblance is in the names "Dr. C. McLane" and "Dr. J. H. McLean," but the "style" of lettering is not the same, saving so far as is unavoidable in names constituted of same letters, where a plain letter is used. The same may be said of the "style" of the remaining lettering on the top. The title words used are entirely different being "Celebrated Liver Pills" and "Universal Pills," and under these words, in defendant's, appears in very indistinct type "or Vegetable Liver Pills." On plaintiff's label, on top of his box, are the words "In Sick Headache and in all Bilious Complaints, surpassed by none. Price, 25 cents" peculiarly arranged, *not one word* of which appears on the top of defendant's box, the words there being

"Prepared only by Dr. J. H. McLean, No. 314 Chestnut Street, St. Louis, Mo." Turning now the box over we find the same difference in "style of engraving" while the lettering itself is both different in "style" and matter: it being in one "Prepared only by Fleming Brothers, No. 24 Wood St., Pittsburg, Pa. without whose signature none can be genuine," and followed by their fac simile signature. In defendant's the words are "For the cure of Liver Complaint, Headache, Bilious Diseases, &c." Turning now to the other side we find still the same marked difference in "*style* of engraving and lettering," and in the matter thereof. One being "In future my genuine Liver Pills will have a fine Steel-Engraved Wrapper and my name in red wax on each box," followed by a fac simile of C. McLane's signature. Defendant has "To prevent counterfeiting I have changed the color of my label," followed by fac simile of Dr. J. H. McLean's signature. If now we turn the boxes with the bottoms up we find that each has a proprietary revenue stamp, the utter dissimilarity of the two being too marked to require comment, and in this one feature it seems to me is shown a difference between the two labels, "H" and "K," so marked—plaintiff's stamp being so peculiar and prominent—as to preclude any argument even that one could be mistaken for the other were it not for the similarity of the names, McLean and McLane. Had plaintiff been willing to sail under his own colors, and rely on his own reputation instead of that of another, and called his pills "Fleming's Pills," your Honors would never probably have heard that there was such a person, and we devoutly hope you would never have known there was such a pill in existence. Having seen fit however to adopt another name, and that a name which defendant has an undoubted right to use, we submit he is not entitled to any straining of the rules to aid him in his effort to interfere with defendant's free use of his own name. It is *damnum absque injuria*. The evidence shows that both parties made several changes in their labels, the fact of defendant making such changes, plaintiff argued below, showed his intention to deceive. Although it is a well settled principle of law that the intent is of no importance, the sole question being has there

been an infringement, yet it may be as well to look at this a little and see if any intent can be inferred from such changes. Plaintiff used a red printed label from 1847 to 1854 (p. 53, ans. 8) and then changed to a black label, or a label having a black ground with letters in white. Defendant used a red printed label, exhibit "L," till 1864 (p. 149) and then changed to exhibit "K," waiting ten years after plaintiff had made his change, a delay which is hardly consistent with plaintiff's theory that he was quick to follow any change made by plaintiff, and defendant gives (p. 137) as a reason for his change from red to black, that complaints were made in regard to the efficacy of his pills; that on examination he found that the extracts he had been using were poor and to get rid of all the old pills and meet the objection that the red labels faded and made the pills too old looking he destroyed all the pills in the hands of his agents, giving them new ones and changing the color of the label to black. There is no proof whatever that defendant ever undertook to sell his pills as and for those of plaintiff, or that any *bona fide* purchaser was ever deceived, the attempt made by plaintiff's agent, Porter, to manufacture evidence, by writing cunningly worded orders to defendant for single boxes of pills, is too contemptible to merit discussion. If the resemblance between the two pills is so marked as plaintiff would have your Honors believe, it does seem passing strange that he has been unable to show a single *bona fide* instance of deception among the thousands of boxes sold by defendant in all parts of the country, and although he had one of his attorneys, Clarke, acting as a detective all the while, the only evidence he was enabled to produce was that he, Clarke, bought of three different druggists, in Mobile, Alabama, a single box of pills, he asking the druggist for "McLane's Liver Pills," (he does not say he spelled the word to the man, he was seeking to entrap, or asked for *C.* McLane's Pills), and was given a box of McLean's Pills. That he asked in each case "if they were the genuine McLane's [not *C.* McLane's] Liver Pills, and was assured they were," (p. 89). Plaintiff does introduce witnesses to swear that the labels are calculated to deceive, and some even go so far as to swear that defendant actually in-

tended to deceive, all of which evidence can aid your Honors not one whit, inasmuch as it is but a matter of opinion which the witnesses have no peculiar fitness to give. That the defendant did not intend to infringe, and that Jno. Fleming did not think he was infringing is clear, from the fact that Jno. Fleming asked defendant to prefix to his name, on his labels, the initials "J. H," so that it should read "Dr. J. H. McLean," instead of simply "Dr. McLean," a request with which he at once complied (p. 137). That such a change was made appears from the evidence of the plaintiff, and there is nothing to contradict defendant's statement of the reason for the change. If he made it of his own volition it is still stronger evidence of his intention *not* to infringe. It further appears from the evidence of defendant's traveling salesman, Taylor, (p. 129) that defendant's instructions "were to call the dealer's attention to the fact that there were two McLeans' Pills in the market, * * and always to endeavor to make the distinction both in ordering from their jobbing houses and in selling to their customers." Houts, another traveler for defendant, says (p. 130) he always "impressed the difference of trade-mark, upon wholesale and retail dealers."

On this point of lack of intention or wish to infringe, there is very valuable evidence in the fact that when for the first and only time, during all the years of his use of this label, defendant was notified that he was infringing on plaintiff's rights, he *at once* made such a change in his label as was sufficient in the view of the court below to relieve him of any such charge. The notice was given him, May 20, 1872 (p. 50), and he made the change May 21, 1872, and thereafter in the words of the master " ceased to make or sell boxes of pills having thereon or attached thereto the label or wrapper described in the bill as Exhibit "K" (p. 154.) We therefore submit that there is not only such a marked difference between the respective labels "H" & "K" as to preclude the idea that any one could be deceived *unwittingly*, and an entire lack of evidence of any one having been deceived, or of defendant trying to deceive any one, but, also, the most persuasive evidence that defendant did not intend or wish to infringe, and that plaintiff did not think he was infringing, till after defend-

ant had used his labels with the knowledge of plaintiff and his assignors for more than twenty years, during all which time plaintiff had sold the defendant's pills bearing his labels. (pp. 139, 149.)

If now we look at the other label, Exhibit "L," which the decree declares to be an infringement of Exhibit "H," we find such a marked difference that it seems hardly possible to conceive of any one declaring them to be alike, and to raise an almost conclusive presumption that the decree declaring such resemblance was never very carefully examined by the court, but was left, as is often the case, to complainant's counsel to frame. We have already shown what is the wording on top of "H." On top of "L" it is "Dr. McLean's Universal Pills, for the cure of Liver Complaint, Head Ache, Bilious Diseases, &c. Price (see direction inside) 25 cts." On one side we find an inscription in German, while on the other is "Prepared by J. H. McLean, Corner 3d & Pine Sts., St. Louis, Mo." On the bottom is an ordinary internal revenue proprietary stamp. The "style of engraving, printing, and lettering" in the two is different to a marked degree, while the labels themselves are in the one case *pink or red*, and in the other *black*, so that in fact the only resemblance there is between the two is their size, the similarity of name, and the fact that they are both called pills, one being a "Universal Pill" and the other a "Celebrated Liver Pill." In addition to this want of resemblance between "H" & "L," there is most conclusive evidence that by the use of "L" we have never infringed on any right of plaintiff, in the fact that we ceased using "L" in 1864 or 1865, (p. 149) more than five years prior to plaintiff's succeeding to Fleming's title—9th Nov., 1870—; and, also, equally cogent proof that by its use we never infringed on Exhibit "H," which was not adopted till 16th Oct., 1871 (p. 53 ans. 8), more than six years after our abandonment of "L."

II.

Plaintiff was not entitled to any damages or costs.

Admitting that the Court properly found infringement, and that the decree in perpetually enjoining the defendant was not open to objection, yet we say that under the circumstances of this case, as they appear from the evidence, the plaintiff was, *in* entitled to costs, by no means in a position to ask or receive any damages at our hands.

Vigilantibus non dormientibus aquitas subvenit is a well established and salutary maxim in equity, peculiarly applicable to the case at bar, and one which the facts, as detailed in the evidence, call upon your Honors to rigidly enforce. It being a condition precedent that the party asking the interference of a court of equity, and the exercise of its extraordinary powers, should show affirmatively that he is entitled to such relief, and that by no negligence—by no laches—by no sleeping on his rights—he has precluded himself from making such a demand, *a fortiori* is he in no position to make such a prayer when he not only fails to make such a showing, but his own evidence is conclusive of his utter and gross negligence, and lack of the slightest approach to diligence in asserting his rights. Such is exactly the case now presented to your Honors.

Plaintiff testifies (p. 36, ans. 13), that as early as 1855, he knew of defendant's imitation of his labels. Defendant says (p. 139), "Jno. Fleming, between the years 1865 and 1870 or 1871, bought largely from me of Dr. J. H. McLean's Universal Pills, and sold and traded them in his store in New Orleans, and by special request that I should sell his pills, Dr. C. McLane's Liver Pills, when they were called for as well as my own."

J. G. Taylor, defendant's bookkeeper, says (p. 149), "The firm of J. H. McLean had several bills of goods ordered by the New Orleans house of Fleming Bros., both verbally and by letter. John Fleming ordered them verbally. He ordered Strengthening Cordial, Liniment, Universal Pills, and Vermifuge. By ordering I mean that he purchased the goods from Dr. McLean."

Added to this evidence of actual knowledge, must be the further facts that from 1865 defendant had spent from $50,000 to $80,000 per year in advertising this and his other medicines (p. 140), and since 1859 he had circulated these advertisements all over the United States, in numbers varying from 50,000 to 8,000,000 per annum, which of itself would affect the plaintiff with knowledge, also, of the extent and magnitude of defendant's dealings in these medicines bearing the so-called simulated labels. Yet in the face of all this, plaintiff, while a member of the house of Fleming Bros., nor Jno. Fleming during his lifetime, ever intimated to defendant that he was infringing on their rights; and even the plaintiff, after he became vested with all the rights of Fleming Bros. and of John Fleming, waited more than eighteen months before notifying defendant that he was infringing—which notification defendant met by adopting the next day a new label. Porter testifying (p. 50) that he notified defendant on the 20th May, 1872, and the evidence showing that on the 21st May, 1872, defendant adopted a new label (p. 138). Porter says further, that on the 28th May, 1872, he called again on defendant who showed him a box of pills with the new label on. Yet, in the face of this compliance with their demands, this bill is filed on the 1st of June after they knew that we had ceased to infringe even on their construction of the law as to their rights. Under this state of facts we submit that the most the plaintiff can be entitled to under the most liberal construction of the law is an injunction with costs, but in no event should he recover any damages. That such has been held to be the law is evident from the following citation:

Where plaintiff's delayed for one year to bring suit for infringement of their trade-mark, the court, V. C. Wood, said, "The plaintiffs having delayed so long before coming to the court, could have no account of profits."

Harrison v. Tyler, 11 *Jurist* (*N. S.*) 408.

Where plaintiff delayed two years in filing his bill, the court dismissed his bill with costs, saying:

"Suppose you wish to profit by that act, of which you say you have a right to complain, and shall, at some future period complain of, then I apprehend this court will say, you must come here at once, for this reason, that you ask in the bill for an account of the profits made by this gentleman upon the sale of these goods. The plaintiff may say, 'It may answer my purpose to let the defendant go on selling four or five years, and, then, at the end of that time, to say he is my salesman, and I come for my account of profits.' I know of no instance in which the court has given relief with reference to a trade-mark, except on a prompt application, * * * it is a fraud to allow a plaintiff to avail himself of delay to obtain benefit for himself."

Beard v. Turner, 13 *L. T. R.* [*N. S.*] 747.

"The existence of the fact [acquiescence in the use of trade-mark] may be a proper subject of inquiry in taking an account of profits."—*Amoskeag Manf. Co. v. Spear*, 2 *Sand.* [*S. C.*] 599.

"It is requisite that a complainant, seeking the aid of a court of equity by injunction, shall not have been guilty of laches or delay in the assertion of his rights; for while delay may not amount to proof of acquiescence in the wrong for which he seeks redress, it may yet suffice to prevent his obtaining relief by injunction." *High on Injunction*, § 7 *and cases cited.*

When many years have elapsed before the plaintiff takes steps to restrain the infringement, the court will require the plaintiff to prove that he has been actually injured by the infringement before it will grant an injunction.—*Rodgers v. Rodgers*, 31 *L. T. R.* [*N. S.* 285.

Where the plaintiff had delayed commencing suit an injunction was issued to restrain the use of plaintiff's trade-mark, but without damages or account of profit, and without costs.—*Amoskeag Manf. Co. v. Garner*, 4 *Am. Law Times*, [*N. S.* 176.

Where plaintiff delayed commencing suit from January, 1874, to August, 1874; *held*, that he was precluded by delay from right to relief.—*Eastcourt v. Eastcourt*, 44 *L. J. R.* [*N. S.*], *ch.* 223.

Judge Blatchford held in *Canal Co. v. Clark*, 7 *Blatch.* 112, that, by acquiescing in infringement of their trade-mark, the plaintiffs were equitably estopped from enjoining the defendant from using the same.

Where a trader acquiesces in a particular infringement of his trade-mark for a considerable period during his life, his representatives will be unable to restrain it after his death.—*Hovenden v. Lloyd*, 18 *Weekly R.* 1132.

If these citations correctly state the law in this regard, it is quite clear that plaintiff's delay, since he came into exclusive possession of these labels, is amply long to debar him from damages, if not from an injunction, but inasmuch as we think he must also be held accountable for, and affected by, the longer delay and the greater laches of his predecessors, through whom he derives title and with whom he was for a long time associated as a partner, it seems quite beyond doubt that he has no standing to ask damages or even costs of a court of equity. He must be held to have taken his title to this trade-mark or label *cum onere*.

III.

If Plaintiff was entitled to an account it was only from the 16th day of October, 1871, not from the 9th day of November, 1870.

The decree is very specific in finding that we infringe only on *exhibit "H,"* consequently it needs no argument to show that plaintiff can recover no damages save for the infringement of exhibit "H," and that such damages cannot be assessed from a date anterior to plaintiff's adoption and use of exhibit "H."

Now the evidence of plaintiff's witness, Helm, the man who did all his engraving, from 1854, shows that exhibit "B" was printed and delivered by him to plaintiff up to Oct. 16th, 1871, (p. 53 ans. 8). After this date exhibit "H" was adopted, consequently any assessment of damages must not be ordered back of this date; and if the decree does order such an anticipation of this date, it is *pro tanto* erroneous. Now this is exactly what has been done by the Court below. "And the Court does further order that the bill * * * be referred * * * to take and state an account of the damages resulting to said complainant since

November 9, 1870," and, lest there should be any mistake in regard to the date from which damages were to be assessed, the decree continued: "And it is further ordered that said defendant * * * produce before said master a full, just and true account * * * stating what number of boxes of pills he, said defendant, has made and sold since the *9th day of November, A. D.*, 1870, having thereon or attached thereto the label or wrapper exhibit "L" or * * * exhibit "K," and showing at what price the same were sold, and at what profit," (p. 151). The master in accordance with such order—as he was bound to do, the order being imperative and giving him no discretion, so far as the date was concerned: *Williams v. Leonard*, 5 *Fish.* 383 — did proceed to assess the damages as stated in his report from "the 9th day of November, 1870, the date designated by the decree" (p. 154), and his report of damages, so assessed, was confirmed by the Court below.

IV.

The master should have allowed defendant one-fifth of the printing and paper account.

The evidence shows that defendant sold five different proprietary medicines—four beside the Universal Pills—: that a large amount was expended for printing and paper on account of these five medicines jointly, no separate account having been kept with each medicine of the amount spent for it specially, and as the evidence is clear that the same amount was spent for one medicine as for another, we think each of the five medicines was properly chargeable with one-fifth of such expenses, and consequently in estimating the profit defendant has made on any one of the medicines, this one-fifth must be deducted from the receipts for such medicine. The master refused to do this, but held (p. 155), "As the gross amount of the sales of medicines is to the gross amount of the sales of the Universal Pills, so is the gross amount of such general business expenses to the proper

amount thereof sought for, to be applied to said pills as a credit in the account."

The master does not deny, in his report, that the amount incurred for printing and paper was incurred equally for the five medicines. He does not undertake to pass upon this question, as he considers that the rule above stated is one that "will yield a result as approximately correct as any that can be otherwise attained." No evidence whatever is introduced to show that this expenditure for printing and paper was not equal for each of the five medicines, while the testimony that it was so is clear and distinct, and supported by the exhibits filed. (p. 196 *et seq.*)

It cannot be said that defendant having seen fit to keep this account in the aggregate, without charging each medicine separately with the amount expended for it specifically, must therefore, as contended by counsel below, be punished as for a wrongful confusion of goods, for no one ever heard, I imagine, of a merchant keeping a separate debit and credit account with each article he deals in, or that it was his duty so to do. Defendant kept his accounts accurately, as the evidence shows, and among those accounts was one for printing and paper, showing the cost of circulars, almanacs, and other printed matter used by him to advertise his five medicines, not any one of them separately, but as the evidence is, all of them together, giving the same amount of space to each one; and all we ask is that each of these medicines, having obtained equal advantage from such advertising, or at least had the opportunity of obtaining such advantage equally, shall bear equally the expense thereof—one-fifth each. Whether the effect of such advertising resulted in causing the sales of the several medicines to be equal or the amount realized for each to be the same, can have no bearing on this question—which is, simply, how much profit did defendant make on these pills, and to ascertain this the expenses must be first deducted. If the result of such a mode of calculating the profits shall show that the defendant made no profits, but on the contrary, sustained a loss—as the fact is, the plaintiff can have no reason to complain. He "had his election to proceed for such gains and profits or to sue for damages, and he chose the former, * * * and it is no hardship

that he is held to his election.—*Williams v. Leonard*, 5 *Fish.* 383.

"In cases where profits are the proper measure, it is the profits which the *infringer* makes or ought to make, not the profits which the *plaintiff* can show *he* might have made."—*Burdell v. Denig*, 92 U. S. 719.

"In cases where gains and profits alone are to be considered, where the defendant has used the infringing machine so unskillfully, or in a manner so unbusiness like, that he has made no profits, the complainant can recover none."—*Connover v. Mers*, 6 *Fish.* 506.

As already stated, the evidence in relation to this matter is all one way, there is no contradiction or attempt at contradiction, the master neither admits nor denies it to be true, for the reason that he deems another way of estimating this allowance to be more proper, consequently we submit the fact must be taken as proven that one-fifth of this printing and paper account was incurred for the pills, and therefore the only question is, whether that proportion or the proportion arbitrarily assumed by the master shall be adopted. One reason given by the master why he will not adopt the one-fifth allowance is because (p. 159) "so many uncertainties, estimates and contingencies are encountered, etc." as if the only allowances defendant was entitled to were such as could be specifically and with mathematical precision proven, in which he is clearly wrong, as he is entitled not only to such as are susceptible of specific and definite proof, but also to those which are merely estimates. For said Justice Nelson in *Wilbur v. Beecher*, 2 *Blatch.* 132: "The interest on capital, the *risk of bad debts* [a very uncertain estimate] * * * are all to be taken into account in arriving at the profits which the defendant has made." We submit, moreover, that this is a case where the defendant is entitled to every allowance the rules of equity will give him, and even to a straining of those rules in his favor, for the evidence is clear that he was no wilful infringer—he stopped at the first intimation of objection on the part of the plaintiff—and plaintiff is shown to be guilty of the grossest lack of diligence, sitting quietly by for years, and not

only seeing the infringement going on, but even making a profit himself out of the infringing articles by dealing in them as merchandise.

We submit we have shown our objections to this decree are well taken, and that the following conclusions are inevitable:

Exhibit "K" does not in fact infringe upon exhibit "H," and any evidence of intent so to do is entirely wanting, while proof of a desire not to infringe is abundant.

Exhibit "L" is in no respect like Exhibit "H" and cannot be held to infringe it, inasmuch as it was abandoned years before "H" was adopted, and cannot be held to infringe on any rights of plaintiff because it has never been used since his exclusive rights vested.

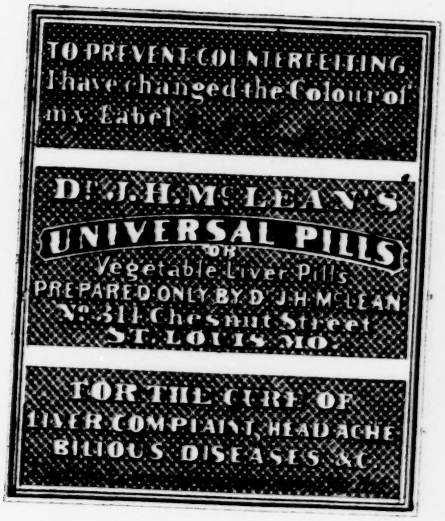
Plaintiff is not entitled to any damages or costs on account of the laches of himself and those through whom he claims title, but if he is entitled to damages, it can be only from 16th Oct., 1871, not from 9th Nov. 1870, inasmuch as Exhibit "H," which we are held to infringe, was never used till the former date.

Defendant should be allowed one-fifth of the printing and paper account not only because the proof shows it to be just, but, also, because it would be equitable to give him the benefit of any doubt, if there be any, in regard to it, for the reason that he shows himself to be an unintentional infringer, ready at a moment's notice to make a complete change, and one which the court declared to free him from any charge of infringement.

SAM'L S. BOYD,

Counsel for Appellant.

EXHIBIT "K"



1870

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877.

No. 259.

JAMES H. MCLEAN. *Appellant,* vs. COCHRAN FLEMING, *Appellee.*	APPEAL FROM THE U. S. CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI.

SUPPLEMENTAL BRIEF OF S. S. BOYD, *for Appellant.*

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SUPPLEMENTAL BRIEF OF S. S. BOYD, *for Appellant.*

Relying upon the points heretofore made we propose now, merely to answer the argument presented, and examine the authorities cited by appellee in his printed brief, and incidentally add somewhat to the reasons already presented in support of our theory of this case.

On p. 6, appellee quotes a portion of the syllabus in ***Woollan v. Ratcliff***, but omits the balance which is sustained by the opinion and is quite pertinent:

"But in such a case it is essential that the imitation should be necessarily calculated to deceive, and where it did not appear that any one had been in fact deceived, [just this case] and a material part of the plaintiff's peculiar mark had been omitted, [as in this case, the peculiar proprietary stamp, place of manufacture, "Liver Pills," etc.] the court notwithstanding circumstances of suspicion refused to interfere."

"It further appears, said the Vice Chancellor, that Eaton [consignee of Ratcliff] had given this information [of the infringement] to the plaintiff so long ago as December last, [hearing was May 26th and 27th] and the plaintiff ought therefore to have done one of two things, either he should have communicated *at once* with Ratcliff and obtained the explanation he has given here, or else, if he determined on applying to this court in the first instance, he should have taken care to show that some one *had in fact been deceived*."

The case was thus: Plaintiff was in the habit of making up his bundles of silk in a particular form, with forty-eight heads of silk in each bundle, tied with five strings in different places, with the silk protected from the knots of the strings by pieces of foolscap paper of a particular form, the heads of silk being themselves tied with silken strings of different colors, to mark the quality of silk; and he used to place under the centre string of each bundle a label in a particular form, describing the quality of silk and containing the following mark: St. A***—which represented St. A***, the place where the plaintiff's manufactory was, and which was well known in the trade as the plaintiff's trade-mark. The defendant manufactured for one Young a quantity of silk in bundles, in exact imitation of plaintiff's, and affixed to them a label exactly like that of the plaintiffs' except that the mark St. A*** was omitted in obedience to an order from said Young to supply him with silk made up to match one of the plaintiffs' bundles, then sent him, with the exception of the trade-mark. A much stronger case than the present of intent to imitate, and yet the bill was dismissed with costs, because the plaintiffs did not show that any one "had in fact been deceived."

We have said in our brief heretofore that there is "an entire lack of evidence of any one having been deceived." We did not support it by special reference to the testimony, as we hardly supposed even appellee would undertake to assert the contrary. Inasmuch, however, as counsel has seen fit to state (p. 11) that "He has shown that actual deception was successfully practiced," and cites the instances,

it may be well to examine these cases of alleged deception, and see if they bear any such construction. He says Crane, Gilliland, Henry, Treanor, and Rohbuck prove this. Let us see if they do: Ans. 10, p. 80 in the evidence of Crane, referred to by appellee, he is asked if he knows "of defendant's pills having been sold as, or substituted for, the pills of plaintiff," and he answers:

"Yes; in Mississippi they have not only been sold as such but have been left in place of Dr. C. McLane's pills, *under the supposition* that they were the same pills as Dr. C. McLane's. J. H. McLean's agent in traveling through the country would leave McLean's pills in place of McLane's pills, *with the impression* that he was taking them up because they were not fresh and that he wished to exchange them to get his pills into the market, and take up Dr. C. McLane's pills which he could readily sell elsewhere."

That is, assuming the truth of the statement, defendant's agent bought plaintiff's pills and paid for them in other pills; but it does not appear that the purchasers were deceived, nor does the witness undertake to say that defendant knew of, or authorized, such a transaction. The witness lives in New Orleans, these transactions took place as he says at Fayette and Port Gibson, Mississippi, but how he came to hear of them does not appear. Gilliland says (p. 95):

"Int. 9. Do you know of defendant's goods being sold as and for those of plaintiff?

"Ans. Not directly so: but I often sell J. H. McLean's pills when customers call for McLane's pills, without inquiring which McLane they mean.

"Int. 10. State whether it is customary with you, when you are out of Dr. C. McLane's pills, to sell the other when McLane's pills are called for?

"Ans. Yes sir; it is."

That is, when the purchaser did not particularize which pill he wanted, witness would sell him either indifferently. To make this a case of deception of the purchaser, we must assume that all purchasers always meant the plaintiff's pills when they called for these pills.

Henry (pp. 96, 97) states his experience thus:

"Some time, more than a year ago, within two years certainly, I went into Brodhead's drug store and asked for a box of McLane's pills for the use of my

wife. I got the pills; supposed, of course, they were the pills manufactured by Fleming Brothers; in fact I did not know at that time there were any others [so of course he did not specify which he wanted]. I took them home, and my wife took the quantity as directed and in a day or so she remarked that the pills did not seem to have the same effect that they usually had. I then looked at the box and wrapper and discovered that they were a different pill altogether. They proved to be the pill of J. H. McLean, of St. Louis. I then called Mr. Brodhead's attention to this fact, and he said he knew they were not the Fleming Brothers' pills; that he had ordered McLane's pills of Kelly, a wholesale dealer in Pittsburg, and supposed, of course, he would send him the pill manufactured by Fleming & Brothers; *he had not designated which pill* and they sent him the St. Louis pill."

No deception here by defendant, no intentional deception by Brodhead, and no deception of Brodhead by Kelly. All the mistake that occurred was from the similarity of the names McLane and McLean.

Treanor, in the employ of Joseph Fleming, Pittsburg, says, p. 98:

"Int. 7. Do you know personally of any instances where the pill of J. H. McLean, of St. Louis, has been delivered by mistake for that of Fleming Brothers?

"Ans. Yes sir. I think about May, 1871, J. B. Duncan, in the employ of Joseph Fleming, sold one dozen of J. H. McLean's pills, of St. Louis, instead of the C. McLane's pills, *through mistake*. C. McLane's pills had been called for. The mistake occurred through resemblance between the wrappers of the pills. I was present when the mistake was made and discovered immediately afterwards."

Rohbuck says, p. 83:

"Int. 10. State whether or not you know of instances where defendant's pills have been substituted for or sent in mistake for those of plaintiff's?

"Ans. *I do not know of their being purposely substituted*, but I do know of instances where J. H. McLean's pills were sent *in mistake*, afterwards returned, and the party ordering stated that they did not want McLean's pills, but that they wanted McLane's Liver Pills, put up in Pittsburg, by Fleming Bros."

Not much "actual deception successfully practiced" in this case, but rather strong proof that it was difficult to deceive any one reasonably careful. These are all the statements of all the witnesses by whom appellee alleges "he has shown that actual deception was successfully practiced." We think

it needs no argument beyond a reading of the extracts themselves to demonstrate how signally they fail to sustain any such proposition.

Appellee claims on page 9 of his brief that "the record contains positive evidence of fraudulent intent," and asserts that the evidence is found in the letters on pp. 41, 42 and 43, and the evidence of Merrell, pp. 58 and 59. The first and second letters, bearing date 1st and 11th March, 1852, are simply propositions that Kidd & Co., plaintiff's predecessors, should become the wholesale agent at Pittsburg for the sale of defendant's liniment, he promising to reciprocate and do all in his power to sell Kidd's medicines, pills, vermifuge, etc., and also that each should wrap around their bottles the other's circulars—McLean wrap Kidd's vermifuge circular around his liniment bottle, and *vice versa*. The next letter, 20 Sept., 1852, is a plain business proposition to purchase and sell Kidd's vermifuge and pills, stating that he "has sent out several gross of your (Kidd's) vermifuge" to supply orders.

The other letter, Oct. 27, 1853, reiterates his proposition to make some mutual arrangement as to selling each other's medicines. He says he has frequent orders for pills and "have been advised to put up pills, &c., but do not wish to do so. It would interfere with yours; and, of course you could with the same propriety, put up my or McLane's liniment. Such a collision I would not like, and for that reason wish to get your pills and vermifuge so as I can wholesale them in the country at your prices."

These letters show clearly that defendant was anxious to treat the plaintiff fairly and not improve the advantages which the similarity of the names of McLean and McLane would give him in the event he should enter upon the manufacture of pills, as he had an undoubted right to do. The statement of Merrell, pp. 58 and 59, is contradicted and explained by defendant at p. 139, folio 353.

Counsel state in their brief (p. 10) that the evidence shows "whenever the appellant received orders for appellee's pills, he filled the same by sending his own article," and that the instances of such sales proven were where "the orders were for appellee's goods *specifically*." That the evidence from page 61 to 68 and from 73 to 77 proves this.

Let us see: The witnesses referred to are Rutan, Neal, Ettmueller, Fulton, Foster, Dice, Jones, Yantes, Walton and Benson. In regard to all these witnesses we have to say, first, that neither one of them was deceived in the slightest degree, neither one of them was a *bona fide* purchaser, but each and all of them were the catspaws of this plaintiff's agent, Porter, who persuaded them to write ambiguously worded orders for pills to defendant's office at St. Louis, and furnished them with the money to pay therefor, for the sole purpose of making up a case against defendant—four of them buying 24 boxes each, and the remainder but a *single box each*. In this, however, he signally failed, for there is no pretense even that defendant ever knew of these orders or either of them.

Rutan was a grocer and liquor dealer, and never dealt in medicines. He says, p. 61: "The reason I sent for these pills is that it was suggested to me by Mr. Porter. I had no other reason for it." The order was as follows:

LAMONTE, Nov. 3, 1871.

J. H. McLEAN, St. Louis.

Sir: Send me, per express, 2 dozen boxes McLane's Liver Pills, C. O. D.

W. M. RUTAN.

The answer was as follows:

Office of Dr. J. H. McLEAN, St. Louis, Nov. 4, 1871.

MR. W. M. RUTAN, LAMONTE, MO.:

DEAR SIR:—Yours 3rd, received. I inclose invoice for pills, as ordered. You will please remit by mail and save expense by C. O. D. Awaiting further orders, I am respectfully,

J. H. McLEAN.

Taylor

The invoice was as follows:

ST. LOUIS, Nov. 4, 1871.

Mr. W. M. Rutan, Lamonte, Mo., bought of Dr. J. H. McLean 2 doz. McLean's Un'l Pills. 1. 50 - - - - - - - - - - 3. 00

One p'k'ge p'r exp's.

This, certainly, is not a case of selling his goods as and for plaintiff's, for he is careful to invoice them as *J. H.* McLean, and as *Universal Pills*.

Neal (p. 62) says Porter asked him to send for the pills, and gave him the postage stamps to remit. The order was as follows:

LEXINGTON, Mo., Nov. 21, 1871.

DR. J. H. MCLEAN.

DEAR SIR:—Enclosed find 12 postage stamps. Send, by mail, one box of Dr. McLane's celebrated Liver Pills.

Respectfully yours,

JOS. B. NEAL.

Ertmueller, (p. 63) of Hermann, Mo., wrote at request of Porter for "2 doz. McLane's Liver Pills," and got Universal Pills; says he knew defendant did not deal in plaintiff's pills, and expected he would send his own if he filled the order.

Fulton (p. 64) sent from Cairo, Ill., at request of Porter, for one box "Dr. McLane's Celebrated Liver Pills," and got Universal Pills.

Foster, (p. 65) at request of Porter, wrote to defendant for one box of "Dr. McLane's Liver Pills," and got Universal Pills.

Dice, (p. 66) at request of Porter, sent an order for "2 doz. Volcanic Liniment" and "2 doz. Dr. McLan's Liver Pills," and got an invoice in return for the oil and "2 doz. Un'l Pills." As soon as Dice received this invoice, he wrote to defendant that he had sent the wrong pills, to which he replied: "Regret error in first order, and, to make amends, would say will forward the 2 doz. Liver Pills any way you deem proper to order. * * * I. also, inclose receipt for the 2 doz. Universal Pills, which you will please hold on com'n, if no objection."

Here was an innocent mistake merely, and an honorable amend therefor—all the more honorable when contrasted with the small trickery of Porter in sending the cunningly worded order.

Jones, (p. 69) at request of Porter, sent for a single box of "Doctor McLane's Celebrated Liver Pills," and got Universal Pills.

Yantes, (p. 73) at request of Porter, sent for "one box of Dr. McLane's Celebrated Liver Pills," and got Universal Pills. He "had no use in the world for the pills."

Walton, (p. 74) at request of Porter, ordered one box of "Dr. McLane's Liver Pills," and got Universal Pills.

Benson, (p. 76) at request of Porter, sent for 2 doz. "McLane's Liver Pills" and 2 doz. "McLean's Strengthening Cordial," and received Universal Pills.

It will be noticed that, in no case, is the initial of McLane, "*C.*," given, for the reason that, if it had been, defendant would have at once seen that it was not Universal Pills that were needed. Taking into consideration that all these orders were properly addressed to defendant, by his full name, *J. H.* McLean, sent to St. Louis, where he manufactured; some of them calling for goods which defendant alone dealt in; that the two names, besides sounding alike, appear alike in print, and much more so in writing—some persons spelling them in the same way—it is not to be wondered at that orders, such as these, should have been filled as they were. The testimony of all these witnesses proves nothing save that the chief resemblance between these two labels, and the main cause of all the trouble consists in, and springs from, the similarity of names, McLean and McLane.

To our second point, that plaintiff has lost his rights to any damages or costs by reason of his laches, appellee replies that, having failed to set up such a defense in our answer, it is not now open to us, and cites numerous authorities which, to his mind, support this proposition. Without stopping to

examine these cases in detail, to show that no one of them maintains that this particular defense must be pleaded in order to be made available, it is sufficient, for the purposes of this case to say that this precise question has been passed upon by this Court, and it has been by it determined that this defense *need not* be pleaded or in any wise set up in the answer, in order to be made available.

In *Sullivan v. Portland R. R.*, 94 *U. S.* 811, this Court uses the following language:

"To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, *it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainant, the court will, upon that ground be passive and refuse relief.* Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence and to decide accordingly."

In addition to the proofs showing lack of diligence, the bill itself clearly discloses it, inasmuch as it sets forth clearly that defendant commenced these infringements "prior to the year 1855," and specifically details the various steps he took after that date to imitate plaintiff's labels and trade-marks (pp. 6. 7). And nowhere in said bill is there any reason given for not proceeding against defendant before, nor any hint even that at any time objection was made to his use of said trade-marks, much less that he was ever notified to cease using them or any part thereof. Said Justice Story in *Stearns v. Page*, 1 *Story*, 214.

"The bill is brought for an account after a great lapse of time and a court of equity never entertains any bills of this sort where there has been negligence or laches. It is incumbent on the plaintiff *to set up in his bill the reasons why the bill was not brought at an earlier period in order to repel the presumption of laches or unreasonable delay.* * * * And especially must there be distinct averments of the time when the fraud, mistake was discovered * * so that the court may clearly see whether by the exercise of ordinary diligence, the discovery

might not have been made before, for if by such diligence, the discovery might have been made, the bill has no foundation on which it can stand in equity on account of laches."

This bill does not merely fail to show that the discovery could not have been made earlier, but clearly discloses that the discovery was actually made, and the plaintiff was cognizant of the alleged infringement more than seventeen years before the bill was filed.

Counsel seem (p. 15) to place some stress on the fact that no proof is given that the Pittsburg house of Fleming Bros. —they having a house in New Orleans also—ever dealt in defendant's medicines, as though acquiescence could be shown by no other circumstances or acts of plaintiff—a most unwarranted assumption, for nothing is better settled than that acquiescence may be presumed from any acts or words or even failures to act of plaintiff. We do not rest upon a technical *acquiescence*, our point being that his laches and lack of diligence bar his right to damages and costs. As for the injunction we care not whether it be granted or not, inasmuch as before the commencement of the suit we ceased to use the labels and trade-mark enjoined, but we do not want either damages or costs to be decreed against us. Counsel naively say, in excuse for plaintiff's long delay of eighteen months after he became sole proprietor of these marks, "Appellee came newly to the management of the business at that date. The place where the business was carried on was Pittsburg, Penn., and appellant was operating in St. Louis, Mo.—a distance of 700 or 800 miles—[and a whole 24 hours in time]. Absorbed as he was with his new occupation, and being so far from appellant's base of operations, it would not seem strange that some time should elapse before appellee became aware of appellant's depredations, or even that he was engaged in them at all." He overlooks the fact that he has shown by the testimony of Henry (p. 97) that Kelly, a wholesale dealer in Pittsburg, sold defendant's pills more than a year before this suit

was begun, and by the testimony of Treanor (p. 98) that Joseph Fleming, of Pittsburg, had defendant's pills in stock and sold them as early as May, 1871; that Porter, who has been traveling for the plaintiff's house, and whose business has been for "twenty-five years introducing and selling" plaintiff's pills, states (p. 48) that he has had frequent conversations with dealers in the Liver Pills, in different parts of the country, and that all of them stated that they believed defendant's pills were gotten up in imitation of plaintiff's. Of course Porter reported these conversations to plaintiff, and the subject was undoubtedly often discussed by them together. Is it not also probable that Porter made every effort to ascertain that defendant was selling his goods as and for plaintiff, and, failing in this, resorted to the hackneyed and low device of persuading parties to send cunningly worded letters to defendant asking for a single box of pills. Out of the thousands of legitimate and *bona fide* sales of defendant, he cannot find a single one which will answer his purpose. Why the very fact that he was obliged to resort to this device to prove his case is the strongest evidence we could present of defendant's good faith and desire to sell his medicines on their own merits.

In regard to our third assignment of error that the Court below erred in ordering an account from 9 Nov. 1870, instead of from 16th Oct., 1871, counsel say, (p. 18) that we cannot urge it here, because we did not make this a point of exception to the Master's report. To this we reply that the master committed no error in so accounting, inasmuch as he was ordered so to do by the Court, and hence no exception would lie to his report on that account, as was expressly decided by Judge Woodruff in *Williams v. Leonard*, 5 *Fish.* 383, he holding that it was the decree alone which was erroneous in such cases, and to that alone would the exception lie. Counsel further insist that as the motion for rehearing did not contain this point, we cannot now make it. As he admits,

however, that such motion was not necessary to an appeal, and as this court tries the case *de novo*, on all the evidence, we think his point is not well taken. The record, indeed, does not show that this point was ever presented below, and whether it was presented orally at the settling of the decree I cannot say, inasmuch as my retention in the case occurred after the close of the accounting before the Master.

The objections made by counsel to our fourth assignment do not seem to call for any answer other than as found in our brief heretofore.

SAML. S. BOYD,
Counsel for Appellant.

1 Fr. 25 Cs. oder 10 Sg

Die Schweiz

in

Original-Ansichten.

Mit

einem historisch-topographischen Text

von

H. Runge.

Dritter Band.

Die Westschweiz.

Darmstadt,
1867.

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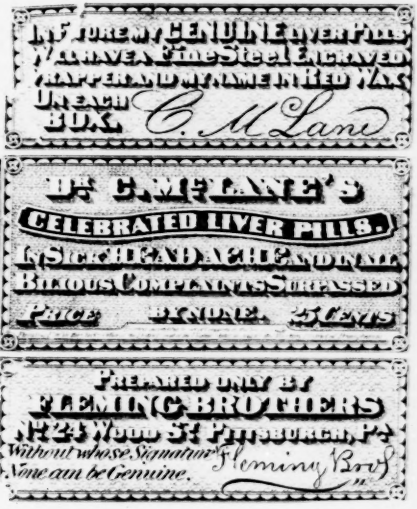
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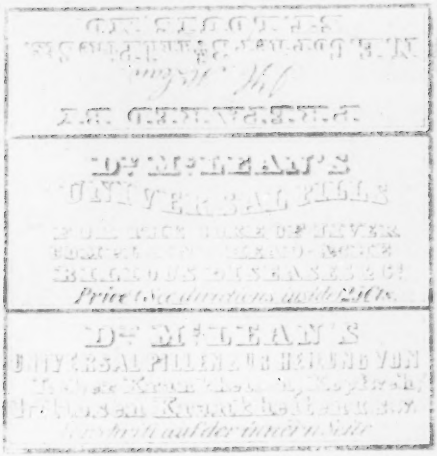
Exhibit L



Supreme Court of the United States,

No. 259.

JAMES H. McLEAN, APPELLANT,

vs.

COCHRAN FLEMING, APPELLEE.

APPEAL FROM THE U. S. CIRCUIT COURT,

EASTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLEE.

M. L. GRAY
AND GEORGE DENISON,
Counsel for Appellee.

Supreme Court of the United States,

OCT. TERM, 1877.] [No. 259.

JAMES H. McLEAN, APPELLANT,

vs.

COCHRAN FLEMING, APPELLEE.

APPEAL FROM THE U. S. CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI.

BRIEF OF M. L. GRAY, AND GEORGE DENISON FOR APPELLEE.

STATEMENT OF THE CASE.

Appellee filed his bill averring his proprietorship of an article of medicine known as "Dr. C. McLane's Liver Pills;" that the same had an extensive sale and was of great value.

It is further alleged that these pills were first made and sold by the inventor, Dr. Charles McLane, prior to June 19, 1844, at which time he transferred to one Jonathan Kidd the exclusive general right to make and sell the same, reserving to himself only a local right which was also afterwards relinquished to appellee's grantor.

That, after said date, said Kidd made and sold said pills until April 11, 1845, when he formed a partnership with one John Fleming, under the style of Jonn. Kidd & Co. and that firm thereafter continued to make and sell the pills.

That, during or before the year 1847, said firm commenced putting up said pills for sale in boxes of uniform size, shape and appearance, elliptical in form with an impression stamped in red wax on the cover of each box, around which they placed a red label or wrapper, engraved with letters and devices described in the bill as *Exhibit B.* (Printed record page 2.)

This label, with the devices &c., as described in the bill, together with the red seal on the box, constituted the tokens or trade marks by which respondent made known to his customers and the public the genuine pills, made and sold by said firm, which was also the owner of the original recipe and the exclusive right to make and sell.

On the 20th day of March 1853, Jonathan Kidd died, and the business was carried on by John Fleming, surviving partner, until April 30th 1853, when Kidd's executors conveyed to said Fleming and this respondent the recipe for said pills, the right to make and sell the same, and to use thereon said tokens, labels, and trade marks, who continued the business under the firm name of Fleming Brothers.

This firm, with some changes in the individual partners, continued until 1865.

In the year 1855 Fleming Brothers, to further protect their rights and enable their customers to obtain their genuine medicine, designed and used, together with the other devices before mentioned, the dark label designated in the bill as exhibit "F," and therein fully described. (Printed Record page 3.)

This firm continued to carry on the business in said firm name until 1st July, 1865, when Cochran Fleming, for a consideration of $35,000.00 sold out his interest to John Fleming, who then became sole proprietor, and continued such until his death, on the 2nd day of November 1870.

By his will said John Fleming bequeathed to this respondent the proprietorship of, and all rights appertaining to, the manufacture and sale of said pills, subject to certain conditions, which were complied with by respondent; and since the probate of the will of John Fleming, on the 9th day of November 1870, this respondent has been making and selling said pills and using the labels, tokens and trade marks to designate their genuineness as set forth in the bill.

During the years 1852 and 1853 the appellant, James H. McLean, who was then engaged in selling patent medicines in St. Louis, sought to make some business arrangements with Kidd & Co., the then proprietors of respondent's pills, and made certain propositions to them to that end. None of these proposals were accepted, and in the year 1853 or 1854 appellant began to put up and sell pills stated to be of the same general remedial character as those sold by respondent's predecessors, putting them up in boxes of the same size and shape, putting an impression in red wax on the lid of each box similar to those of respondent's in general appearance, and placing around each box printed directions, all inclosed in a label or wrapper, described in the bill as exhibit L. closely resembling in appearance exhibit B to respondent's bill.

In 1855 respondent's predecessors, to designate the article of their own manufacture as stated, and also to avoid the injurious consequences of appellant's imitation of their tokens labels and

changed from the red to the dark label "F," still using their other devices as before.

Defendant continued with his red label until 1865 or 1866 (record page 137) when he began to use a dark label "K." which is the one now complained of. On this label defendant says he made this change to prevent counterfeiting—in his testimony he says he made it to get rid of bad drugs (Record p. July 137). When plaintiff went out of the firm of Fleming Bros. —1865—that firm was using their dark label "F" and defendant was using his red label "L."

After plaintiff received the business from his brother John, he discovered that defendant had also resorted to his dark label, and, when assured of all defendant's fraudulent practices, brought his bill.

The Circuit Court enjoined defendant from using his imitation of plaintiff's labels; and, upon an accounting, decreed to plaintiff the profits made by defendant from the use of his imitations thereof. Defendant appeals to this Court.

—POINTS.—

1. The court below committed no error in granting the restraining order against appellant.

It is not necessary in order to give a right to an injunction that a specific trade mark should be infringed: it is sufficient that the Court should be satisfied that there was on the whole a fraudulent intention of palming off the defendant's goods as those of the plaintiff.

Woollam vs. Ratcliff, 1 Hemming & Miller 259.

The physical resemblance of the labels is not the sole question for the court.

To entitle the appellee to relief it is not necessary that the imitation by appellant should be so close as to deceive persons seeing the two labels side by side; the degree of resemblance need only be such that ordinary purchasers proceeding with ordinary caution are likely to be misled.

This principle is fully discussed and maintained in the case of Seixo vs. Provezende 12 Jurist N. S. 215.

The matter involved in this suit is not technical. The gravamen of appellee's complaint in his bill is the injury resulting to him from the unlawful conduct of appellant. It is not alone the use of a specific symbol, but appellant's intentional and wrongful diversion of trade to himself that rightfully belongs to appellee, which is the thing complained of. The court will not dispose of this question solely upon an examination of the labels mentioned as exhibits in the decree of the court below. The bill recites and complains of a systematic attempt on the part of appellant to encroach upon the rights of appellee, and to deceive and impose upon the public by the employment of imitation labels and other indiciæ.

The ground on which courts generally protect trade marks is, that they will not permit a party to sell his own goods as the goods of another, and therefore no party will be allowed to use names, marks, letters or other *indiciæ* by which he may pass off his own goods to purchasers as the manufacture of another person.

Croft vs. Day, 7 Beavan, 84.

Perry vs. Truefitt, 6 Beavan, 73.

It was not necessary for the court below, in order to give appellee the relief to which he was clearly entitled, to find that appellant had exactly copied appellee's label. The bill covers a broader ground. It sets out in detail the means used by appellee—all the *indiciae*, employed by him to designate the goods of his own manufacture, and it is then averred that appellant deliberately resorted to the use of the same marks on his own goods. It is alleged that he did this with intent to deceive and defraud, both the public and this appellee; that the means used were calculated so to deceive, and that they did actually deceive and mislead the public and defraud appellee.

In order to constitute a ground for interference it is not necessary that there should be *mala mens* towards the first purchaser of the article imitated.

It is not necessary to show an exact resemblance—it is sufficient if there is such a resemblance as will mislead unwary purchasers.

Wotherspoon et al vs. Currie, Law Rep. 5.
House of Lords, English and Irish Appeals, 508.
Newman vs. Alvord, 51 N. Y. 189.
Kinney vs Bosch, Am. L. Reg., N. S. Vol 16, p 596.

It clearly was not accidental. When appellant first began to make and sell his pills, appellee's pills had acquired a wide reputation and the business was of great value. A uniform method of putting them up for sale had been adopted. This method

embraced size and style of box, printed directions, the red seal on the lid of each box and the red label, exhibit B, to the bill. All these were closely imitated by appellant Moreover, the proof shows that the idea of this encroachment on the rights of appellee and his predecessors was suggested to appellant by the resemblance of his name to that of the inventor of appellee's pills.

Record page 58.

After appellee's predecessor, to escape the injury of an imitation of his red label, had adopted a dark label in lieu of this, appellant followed in his wake with an imitation of the latter.

He also used the red seal on the lid of each box in imitation of that used by appellee.

This means of identifying his goods was peculiar to appellee. It was characteristic, and its use noted on the wrapper. It is not usual on pill boxes. The mere presence of such a mark on the boxes of appellant was calculated to mislead.

(Testimony of W. H. Collins, record page 100.)

Appellant also resorted to the use of pill boxes of the same size and shape as those used by appellee. This fact by itself might be insignificant, but, considered in connection with the other points of resemblance, corroborates our view that the deception and fraud were deliberate.

But the proof of fraudulent intent is not solely derived from inference. The record contains positive evidence. Appellant's letters on pages 41, 42 and 43 of record show that he was seeking some terms with appellee's predecessors which were refused; and the testimony of Merrell, pages 58 and 59 record, shows that appellant deliberately undertook to counterfeit appellee's label at the time he first put up pills for sale.

It appears from the evidence that, whenever the appellant in the course of his medicine business received orders for appellee's pills, he filled the same by sending his own article put up with the obnoxious insignia complained of. It matters not that orders were caused to be sent by appellee, as testified to by many witnesses. The fact that these orders, so sent, were filled with spurious goods, affords good proof of the intent and practice of appellant. The orders were for appellee's goods, specifically, and appellant filled them with his own.

The testimony of the witnesses, appearing in the record from page 61 to 68 and 73 to 77, confirm this view. Appellant says that he kept appellee's pills for sale; but it appears, so far as we can ascertain, that he never sold any, always filling orders with his own counterfeit article. Hardly any better test of appellant's motives and purpose could be applied.

If only a single instance were given, or if in any case, appellant had honestly delivered the goods actually called for, it might indicate only a mistake, but in every sale the fraud is repeated.

Appellee procured the testimony of a large number of witnesses, tending to show that appellant's imitations of appellee's tokens, labels and trade mark were calculated to deceive and did deceive purchasers. On this subject there is no conflict of testimony disclosed in the record. It is all one way, and, although generally where the testimony of experts in such a manner is conflicting, such evidence is unsatisfactory, the unanimity here shown gives great weight to the statements of dealers and experts. All the witnesses called by appellee on this point show their competency to speak intelligently in the matter. They represent the largest dealers in the principal

western cities, and appear, and are, disinterested. Their declarations are positive, unhesitating and, as already said, unanimous.

But appellant's claim to relief is not based entirely on this class of evidence. He has shown that actual deception was successfully practiced. This is established by the testimony of Crane record, page 80, of Gilliland, page 95, of Henry, pages 96 and 97, of Treanor, page 97 and 98, and of Rohbock, page 83.

The testimony of Taylor, an employee of appellant, (record page 124 and 125), although in some respects bearing internal marks of unreliability, tends to show that one label could be taken and was taken for the other. There can be no doubt as to appellee's older right to use these labels and devices, and if the imitations by appellant are interchangeable with them, appellee is the one entitled to protection in their use.

But appellee claims—and the court below so found—that appellant's enjoined label is an infringement of the label belonging to appellee.

The style of engraving and lettering was substantially copied by appellant from the label of appellee. The general appearance of the labels is the same, or sufficiently so to accomplish deception. Seen from the shelves of retail dealers, or even at the purchase by consumers, where the real mischief is wrought, appellant's imitation of appellee's label enables the former to perpetrate the fraud complained of. Especially is this the case here, where it appears that appellant resorted to the other means designated, iu aid of the counterfeit label, to wit: the same size and form of box with the red seal on the lid.

The letters on the two labels are of the same shape, size, and color, and of a peculiar style of formation. The effect in appearance produced by the engraving and lettering on appellee's label, could hardly be duplicated, unless by design. It is not likely that appellant would have used for his label the dark engraved back-ground with white letters, so conspicuous on appellee's label, if he had not first got the idea from the latter.

We maintain that the infringement is palpable.

II.

The court having found that appellant was guilty of the wrongs complained of by appellee, it was proper that an accounting should be ordered.

Appellee elected to proceed in equity to enjoin appellant from further trespassing, and also to recover the profits realized by him through his unlawful use of appellee's labels, trade-marks and devices. If appellant had made no profits, of course he would be adjudged to pay none, and this could only be ascertained by an inquiry.

There seems to be no dispute as to what is the correct rule as to measure of damages.

Graham vs. Plate. 40 Cal. 503—507.

In Bell vs. Daniels, 1 Fisher 372, it is said that the true rule has been to give to the plaintiff as damages, the amount of profits which the defendant has derived from the use of the plain-

tiff's improvement. The application of this principle here is nowhere complained of. The essence of appellant's second error assigned must be that the court below ought not to have awarded appellee anything—not even his costs—in compensation for the injury inflicted on him by appellant.

Why not ?

It is submitted that having (as we think correctly) found that appellee's rights had been infringed, the court must necessarily award him his damages and costs. Certainly this is the case unless there is something appearing in the record which would take away his right to these incidents to his prevailing on the main issue.

It is confidently asserted that nowhere in the record can there be found any position taken by appellant which justifies this assignment of error.

Appellant's answer raises no issue on the question of appellee's acquiescence in the trespass complained of, nor of appellee's laches in seeking redress. Appellant cannot now invoke any pretended laches or acquiescence of appellee to save him from paying damages and costs. If he relied on these defences he should have pleaded them, and he cannot otherwise avail himself of them.

Wyeth vs. Stone, 1 Story, 284.
Lozenby vs. White, 41, Law Jour, Eq. N. S. 354.
Putnam vs. Day, 22 Wall. 66.

A recovery must be had or a defence made by the pleadings or not at all.

Grosholz vs. Newman, 21 Wall. 488.

A defendant cannot avail himself of a matter of defence which appears only upon his evidence and was not stated in his answer.

Stanley vs. Robinson, 1 Russ & M. 529.

Cummings vs. Coleman, 7 Richardson's Eq. S. C. Rep. 509, 519, 520.

Smith vs. Clarke, 12 Ves. 480.

Where the defence of the statute of limitations was not raised by the pleadings, the account should be taken from the time when plaintiff's title first accrued.

Monypenny vs. Bristow, 2 Russ & M. 131, 132.

Harrison vs. Borwell, 10 Sim. 384.

1 Daniel's Ch. (Perkins' Ed). p. 727.

Where acquiescence is relied upon it is essential that the person who acquiesces must know exactly the nature of the thing to which his acquiescence is supposed to be given, and must know also the effect of his acquiescence.

Strange vs. Fooks, 4 Giffard 413.

It would be strange if the court should allow this appellant to ignore appellee's acquiescence so far as the pleadings are concerned, and then permit him to go on the stand as a witness and manufacture this defence in such a way that appellee must call a man from the dead to refute his statements.

At the hearing appellee objected and now objects to any "statement of John Fleming's acts or words as irrelevant and incompetent under the pleadings in this case."

(Record page 140).

And he now insists that his objection was well taken.

Besides, we insist that no acquiescence is shown. There is no pretence that the house of Fleming Bros. in Pittsburgh ever dealt in appellant's goods. Appellant and his book-keeper however say in a general way that the New Orleans house of John Fleming did make some purchases of appellant's medicines and appellant pretends to have been intimate with John Fleming. Cochran Fleming in his testimony, (record page 50), gives John Fleming's opinion of appellant, and the court below has by its finding shown what weight ought to be given to appellant's testimony.

The testimony of Taylor, the book-keeper, ought to have been excluded on appellee's objection, but as it stands is vague and insufficient to show acquiescence. Not a single item of sale is given nor the written orders spoken of produced.

Nor does the record elsewhere contain facts which would justify a denial of respondents damages and costs on the ground of laches. Appellee as legatee succeeded to the business in November, 1870. The bequest to him was conditioned upon the payment of certain other legacies, and the carrying on of the business with that view and for that purpose. Appellee came newly to the management of the business at that date. The place where the business was carried on was Pittsburgh Penn., and appellant was operating in St. Louis Mo.—a distance of 700 or 800 miles. Absorbed as he was with his new occupation, and being so far from appellant's base of operations, it would not seem

strange that some time should elapse before appellee became aware of appellant's depredations, or even that he was engaged in them at all.

The record only shows that as early as October, 1871, and down to the filing of the bill, respondent, believing that appellant was selling his goods as and for those of appellee, for the purpose of ascertaining definitely the facts relating thereto, caused orders for his own genuine pills to be sent from different parts of the country to appellant, who in every instance filled said orders with the pills put up and sold by appellant.

It was proper and right for appellee to take this precaution, and take time to ascertain the facts and also obtain proof of the facts.

Lee vs. Haley. 39 Law Journal (Ch.) N. S. p. 286.

On June 1st, 1872, appellee filed his bill herein to restrain appellant from further infringing his labels and trade-marks.

At law no delay short of statute of limitations will deprive plaintiff of relief.

Taylor vs. Carpenter, 1 Wood & Min. p. 19.

In many cases it has been held that a delay of many years did not operate as a bar.

Amoskeag Manuf'g Co., vs. Spear.
2 Sandf. S. C. 599—615.
Gillott vs. Estabrook, 48 N. Y., 374—379.
Lozenby vs. White, 41 Law Jour. Eq. N. S. 354—355.

Again, having failed to set up these defences in his answer, appellant could not avail himself of them, (even though he first ascertained from the evidence the facts on which they were

based), except by petition for re-hearing and application to file supplemental answer, accompanied by affidavit.

Thomas vs. Doub, 1 Maryland, 252.

McKim vs. Thompson, 1 Bland, 150.

Daniel's Ch. Pr. Perkins' Ed. 1865, p. 781—2 and 3.

Appellee insists that the petition for a re-hearing filed in the court below purporting to be based on newly discovered matter of defence, was properly overruled.

The first ground is based principally on facts disclosed by the evidence of appellant himself and his book-keeper. These matters were of course familiar to appellant, and could not therefore be said to be newly discovered.

None of the grounds of this petition constitute defences set up in appellant's answer, and as appellant at the time of presenting this petition did not ask leave to amend his answer in that behalf or to file a supplemental answer setting up these defences, he cannot now be heard to object to the decree on that ground.

In the case of Nevison vs. Stables, 4 Russ (Ch.) 210, Lord Gifford, Master of the rolls, dismissed a petition for re-hearing because it suggested, as the grounds of the re-hearing, facts not alleged in the pleadings.

III.

The court below committed no error in ordering an account from November 9th, 1870.

To the 3rd assignment of error appellee answers that appellant is not in a condition to raise the question involved.

First, because appellant moved the court below to set aside the interlocutory decree and for a re-hearing, and stated in said motion the grounds of complaint against the decree but did not include this error now assigned. (page 152 of record).

Though this motion for a re-hearing may not have been necessary to a review in this court, respondent insists that as appellant thought proper to petition for such re-hearing and to ask the court to review its action, he will be presumed to have stated in said petition all the errors complained of, and should be restricted in this court to the errors then alleged in his petition for a re-hearing. This error was not then alleged.

Wilkes and wife vs. Rogers. 6 J. R. 591.

Second, appellee insists that as the report of the Master shows the account was taken from Nov. 9, 1870, the error, if any there was, was embodied in that report, and if appellant desired to raise the question of the time from which said accounting was to date, he was bound tohave excepted to the report on that ground, and not having done so, is now too late to raise the question in this court.

The time covered by the account was a material and leading element in the amount of the account, and if appellant objected to the amount arising from the time that the account covered, he should have excepted to the report on that ground. His silence

then on this point is conclusive on him both under the rule of this court and under the decisions of the courts.

Wilkes and wife vs. Rogers, *supra*.

Clause 2, of Sect. 4 of Rule 21, of Sup. Ct.

Again: the record shows p. 162 that, upon the completion of his report and before filing the same in court, the master gave notice to the parties that his report was finished and open to their inspection and objections; that they examined the report appeared on a day designated, and neither party presented any objection thereto.

After the report was filed, appellant took no exception to it on the ground here assigned.

We say then, that not having suggested this point as error in his petition for a rehearing, when the interlocutory decree was entered; nor before the Master when opportunity was given as as above stated; nor before the court at the coming in of the Master's report; nor after entering of the final decree by the court on the report: appellant cannot now in this court be heard in its support.

Story vs. Livingston, 13 Peters, 366.

McMicken vs. Perin, 18 How., 510.

Wilkes and wf. vs. Rogers, 6 J. R., 591.

In the bill it is averred that appellee has used his dark label F. down to the time of bringing the suit, with only a few imma-

terial changes as described. No distinction can be made between bill exhibits F. and H. They are essentially and substantially the same, and it is so averred in the bill, and the court below in ordering the account as it did, so found from inspection and on the evidence.

The account was ordered to ascertain what profit appellant had made on goods sold after November 9th, 1870, when appellee acquired the ownership of these pills, said goods having on them the labels K. or L. It makes no difference whether respondent was using exhibit F. or exhibit H. during that period.

Lemoine vs. Gauton. 2 E. D. Smith, N. Y. 347 and 348.

Brahan vs. Bustard. 1. Hern. and Miller, 447—456,

In the later case the vice chancellor says:

"I cannot hold it to be any justification for a defendant to say, *the plaintiff has two ways of identifying his goods and I have only stolen one of them.*"

Again, the bill prays for two kinds of relief, one an injunction against the further use by appellant of labels in imitation of those of appellee, and the other an accounting by appellant for the damages inflicted by his infringement—the court below granted both kinds of relief— it enjoined appellant from using any label infringing upon appellee's labels or wrappers, described as exhibit H. being the one in use, by appellee, at the time of filing his bill, and an injunction against infringing it, is equally an injunction against infringing F.

But grant that the relief in the way of an injunction, was less than what the bill prayed for, how does that limit or impair appellee's right to full relief for his damages?

The proof shows that appellant used his label K. and sold his goods under it from Nov. 9th, 1870, and that his label was an

infringement of F. while appellee used it, and the court so found, as the order to state the account from that date necessarily shows.

The court below in its decree does not undertake to set out a finding of the facts specifically, and indeed is expressly relieved from doing so by the 86th rule of practice in equity, and is only required to state in the decree what is ordered and adjudged. This the court did, and, on the ground that the proof showed a violation of appellee's trade mark from the 9th of Nov. 1870, the relief was granted as prayed for from that date. See Putnam vs. Day, supra.

It is a mistake, as appellant seems to assume, that respondent's right to an account is limited, by the measure of relief granted in the restraining order.

It was enough to restrain appellant from imitating the label respondent was using when he filed his bill, and the limit of the injunction to that label, does not deprive appellee of the right of relief for damages received, while he was using the label F. equally owned by him and equally infringed.

The meaning of the decree is as if the court had said "I will restrain appellant from imitating the label H, which respondent was using when he filed his bill, which is all the relief he needs in the way of injunction, and will grant him relief in the way of damages for infringing H, while he used that, and damages for infringing F, while he used that."

Appellee by making the slight changes he did in exhibit F, as shown by exhibit H, did not forfeit or lose his right to damages for appellant's violation of the label F.

2. E. D. Smith 347-8, above cited.

IV.

The court below committed no error in overruling appellant's exception to the Masters report.

We deny that the proofs before the Master furnished data to warrant crediting appellant with one-fifth of the printing and paper account, or to authorize him to apply any different principle of apportionment to this item than was applied to any other item of expense, the exact amount of which could not be ascertained. There is no material difference in the evidence relating to this item from that relating to the other items of appellant's account rendered before the Master. No exception is taken to the action of the Master in applying the principle of apportionment according to sales to the other items of appellant's expense account, such as rent, advertising and general expenses, but appellant claims that the printing and paper account should be excepted out of that rule on his assumption that the evidence shows a different state of facts in relation to it. We deny this. We claim that the finding of the Master on this point is in accordance with the evidence.

The testimony on which appellant must rely to maintain this point is that of appellant himself. Of this, we say that he has sworn absolutely contradictory ways about the same matter. He has made out two accounts so contradictory as to falsify each other, and we contend that his contradicting himself so glaringly as he has done, in many instances, places him beyond the pale of credibility. He stands in an unfavorable position before the Master and the court, and appellee is entitled to ask that all doubtful points be ruled against him. Such being the character of appellant's own testimony, his conduct has not been such as to commend him to the favor of a court of equity. Under these

circumstances every doubt and difficulty should be resolved against him.

Goodyear vs. Rubber Co. 9 Wallace 803.

Appellant furnished the Master two accounts, each sworn to. In one he claimed a credit on account of this item of expense of $17,400.00, and in the other of $15,201 95.

Record pages 164, 165 and 166.

The evidence justified the finding of the Master.

The law requires such an apportionment in such a case.

Goodyear vs. Rubber Co. *Supra.*

Hitchcock vs. Tremaine. 5 Fisher's Pat. Cas. 311.

The Master distinctly finds that he could properly make no other.

(Record p. 159.)

Defendant had sought to confuse the Master and plaintiff by rendering false accounts showing large losses.

The court is invited to inspect and compare the two accounts produced before the Master by defendant, both verified by his affidavit.

Record pages 164, 165 and 166.

One was sworn to on July 6th, 1874, and the other on October 15th, 1874, and filed before the Master Oct. 21st, 1874.

(Record p. 312.)

An examination of the record will show that the other statements of defendant are equally unreliable and that bad faith characterizes all his conduct and declarations touching the whole matter.

Upon the facts before him the Master adopted and applied correct principles, distinctly enunciated in his report.

(Record page 155.)

The book-keeper, Driggs, detailed by the Master to examine defendant's books, testifies that they do not show the actual expense of printing and paper expended on the pills.

Record page 234.

Defendant's books contradict his statement that one-fifth of his printing and paper account was expended on the pills, ***and his own testimony is to the same effect*** in some places.

See Record page 348.

We say then, that no ground is shown for a reversal or modification of the decision of the court below.

That the infringement is apparent and that a clear case of intentional fraud is made out against appellant as alleged in the bill, and as shown by the proofs. The record is a large one, and the whole case was carefully considered by the lower court and the Master. It would work a great injustice to appellee for the appellate court to deprive him of the result of this contest for his rights on any technicality, and we are confident this will not be done. This court cannot unless by inspecting the whole record, and weighing the entire evidence—have all the facilities for a full understanding of the matter in controversy as the court below had. It is impracticable for this court to try this case *de novo*, and without such trial the strength of appellee's case on the main issue cannot be made apparent.

Appellee is entitled to the accounting and his costs.

It does not appear that he has been unwarrantably slow in seeking redress, or that he sought, by delay, to reap advantage from appellant's trespass. He acted as soon as he became assured of appellant's wrong doing, and he could gather the necessary evidence of it. Nor is there any evidence of appellee's acquiescence in appellant's fraud.

Certainly if appellant claims to have any such defences as these, appellee should have been advised of that claim by the answer, in order that he might meet them with proof.

Appellant is too late in complaining about the time for which the accounting was ordered.

This question was never raised or thought of in the court below. Nobody's attention was ever called to it there, and no evidence bearing upon it was heard. Moreover, there is nothing in the record to justify the assignment of this point as error. It does not appear that the labels were used in the manner or during the alleged period as assumed in appellant's third assignment of error.

Upon the fourth point made by appellant we need only refer to the report of the Master and the evidence on which it is based, before referred to.

But, as already shown, the appellant has elsewhere accepted the principle which he now complains of. He is therefore estopped from denying its correctness, but, even if he were not, the facts and the law are clearly against him.

M. L. GRAY,
and GEORGE DENISON,
Counsel for Appellee.

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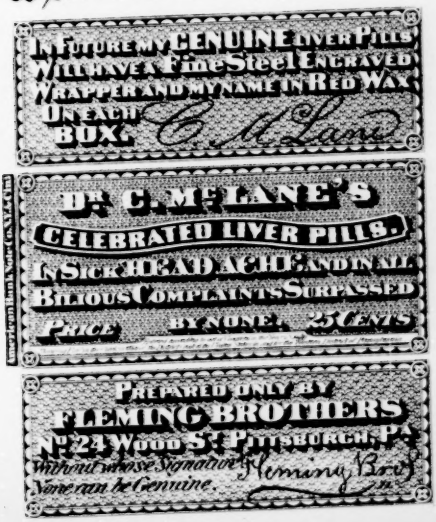
M. L. GRAY,
and GEORGE DENISON,
Counsel for Appellee.

Exhibit F. of Bill

Exhibit H. of Bill



Supreme Court of the United States.

No. 259.

JAMES H. McLEAN, Appellant,

vs.

COCHRAN FLEMING, Appellee,

APPEAL FROM THE U. S. CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI.

SUPPLEMENTAL BRIEF FOR APPELLEE.

M. L. GRAY,
AND GEORGE DENISON,
Counsel for Appellees.

Supreme Court of the United States.

OCT. 7, 1877.] [No. 259.

JAMES H. McLEAN, APPELLANT,

vs.

COCHRAN FLEMING, APPELLEE.

APPEAL FROM THE U. S. CIRCUIT COURT, EASTERN DISTRICT OF MISSOURI.

SUPPLEMENTAL BRIEF OF M. L. GRAY AND GEORGE DENISON FOR APPELLEE.

Appellant's label, in and by itself, is an infringement of appellee's label. The attorney of appellant has pointed out the differences. I call the attention of the court to the resemblances—

1. The size, form, and material of the boxes are the same. These of themselves are nothing, but, in connection with other resemblances, are of importance.

2. The labels of the two articles on the box are very similar in general appearance. The *tout ensemble* is the same, even when examined side by side.

But the consumer does not buy on a comparison of the two side by side. He buys from memory of the label and from general resemblance to the impression it has made on his mind. A customer, having seen the label of appellee, and got

a general impression of it, carries this general impression in his mind, and not the details. Submit appellant's label to him, and it would impress him, from its general appearance, as the same. If he had gone into minute details of the genuine, he might detect the counterfeit; otherwise, not.

3. The background of each is of the same dark color, caused by straight black lines crossing each other obliquely, in appellee's exhibit F and appellant's label K, and in appellee's label H by small circles cutting each other.

4. Both labels have a solid black ground for scroll on the top of label, as it appears on the box, in the same place on the face of the label, for the name of the pill.

5. The style of lettering is precisely the same, and very peculiar, to wit: white letters on a dark or black ground. This mode is peculiar, and is exactly copied by appellant.

6. The name of Dr. C. McLane's in appellee's label and of Dr. J. H. McLean's in appellant's label appears in the same place on each, and on the black scroll containing the name of the pill.

7. The *fac-simile* signature of C. McLane in appellee's labels, of J. H. McLean in appellant's label, appear on the further side of the box in the same place in black letters—that of appellant's so faint that it requires a close inspection to tell whether it is McLane or McLean.

8. The diseases for which the pills are a remedy are substantially the same in genuine and counterfeit, though the places on the labels where they appear are not the same.

9. On the further side of appellee's labels a test for the genuine pills of appellee is stated, and on the further side of appellant's label the converse idea of testing counterfeits is given.

10. The red seal on lid, with stamp of McLean on the wax, in appellant's pills is the same. This was peculiar to appellee and his predecessors, and was exactly copied by appellant.

I think the court can have no trouble in finding, on mere inspection, that appellant's label K is an infringement of both F and H of appellee.

But appellee's proof of infringement is not confined to a comparison of those labels alone. Appellee's predecessors originated and adopted the red or pink label B in or about 1847, and used them as their trade-mark down to about 1855. While they were using label B of the bill, it evidently occurred to appellant, from the fact that parties supposed him to be the maker of the Dr. C. McLane pill, (see page 42, of record,) that it would be a good thing to make a liver pill and palm it off as the McLane pill, unless he could make favorable arrangements with the Pittsburgh house (see his letters, pp. 41–43) and take advantage of this supposition among buyers that he was the Pittsburgh McLane. Failing in these arrangements, he soon goes to work to get up a McLean's liver pill, and what sort of a label does he get up? Why, he gets up a pink or red label with white letters, precisely such a label as appellee's predecessors were then using, and which, on its face, was an evident imitation,—the resemblances between appellant's label L and appellee's red label B being the same as between the dark label K of appellant, and F and H of appellee.

We are not left in doubt as to appellant's purpose, for it crops out in his letters to Kidd & Co., and is clearly avowed to Merrill; (see page 58, of record;) and that object was to sell his McLean's pills for McLane's pills, and to get up a label as near to it as possible, and avoid legal difficulty. (Page 59.)

But this is not all. About 1855 or 1856, the Pittsburgh house changed the label B for F, and ceased using B, and thought they had got rid of appellant's imitation. But in a few years after, appellant, waiting a safe time, changes also from his red label L to his dark label K, following appellee's prede-

cessors as Peter followed his Lord, atar off, in point of time, but very closely in point of resemblance. These changes in the wake of appellee's predecessors cannot be explained away. There is but one solution of these acts of appellant, and that solution is, that both of appellant's labels are and were intended as imitations of the labels of the Pittsburgh house.

But the evidence of infringement does not stop here. A direct and positive test was applied to appellant over and over again, and every time when the Dr. C. McLane liver pill was ordered of appellant, and the name spelled so there could be no excuse under the plea of "*idem sonans*," the appellant sends his own pill as and for that of appellee.

The gentleman on the other side undertakes to treat this evidence with contempt, but it will not down in that way. The motive of the orders on pages 61 to 68 and 73 to 77 in no way excuses or changes the character of appellant's acts and conduct. To him they came as *bona-fide* orders in the usual way, and he so treated them. He filled them as *bona-fide* orders. They were to him practical tests. His filling those orders with his own pills are as convincing and overwhelming against him as if the orders had come from actual purchasers for their own use. His conduct in reference to these orders shows what he had done and what he would do on like orders from any and all customers, and that he deliberately did pass off his own article when he knew the parties would and had asked for appellee's goods. Nor can appellant escape the effects of these acts by saying they were filled by clerks. These acts were his, and bind him. But appellee's proof does not stop even with this. John H. Byrne, on page 78 of record; Crane, on page 80; Gilliland, on page 95; Henry, on pages 96, 97; Treanor, on page 98; Rohbock, on page 83, all show actual cases of passing off appellant's goods for appellee's. Delamater, page 75, folio 189, says:

"The agent of Dr. James H. McLean has called upon me two or three times since I have been in business here. I do not know the name of the agent. He is rather an elderly gentleman.

He was here two or three times. We commissioned his ague pills, and, I think, his universal pills. He wanted to sell me a gross of universal pills. I told him that our demand was principally for the Pittsburgh pills—the McLane Pittsburgh pill. He said that these pills were cheaper, as good, and resembled so closely, and the people buying did not know which pill in particular, I mean between those two, they wanted, only knowing the name of McLane or McLane's Pills.

"Question. Did not McLean's agent convey to you the idea that the chief similarity was in the name?

"Answer. I did not so understand it. He said the names were alike in sound, and the general appearance of the boxes were similar."

The above is positive proof that appellant's agent, in one instance, sought to induce a dealer to take appellant's goods because they resembled appellee's so closely that the people buying—that is, consumers—would not know the difference. This is one example, and illustrates the conduct of appellant and his agents.

In addition, the testimony of numerous dealers from all parts of the country who, from their experience with customers, are peculiarly qualified to judge of the probability of passing off appellant's labels as and for appellee's, coming in to supplement and corroborate the other proof, makes a case of infringement perfectly convincing and overwhelming that appellant's red label L was an infringement of the red label B, and that appellant's dark label K is an infringement of appellee's labels F and H.

The testimony from pages 58 to 68 and from pages 73 to 112 of printed record shows the observations and experience of dealers in regard to the infringement.

The conduct of appellant in dropping his label K in May, 1872, is of itself an admission that it was an infringement.

II.

In regard to appellant's second assignment of errors.

But if appellant, although not having plead as a defense laches or acquiescence, is in a condition to invoke the maxim of "*vigilantibus non dormientibus*," &c., can he derive any benefit from it, under the circumstances of this case and the attitude and light in which he stands? I assert, with confidence, he cannot. The proof shows a most deliberate, persistent, and willful determination on the part of appellant to hang upon the skirts of appellee and his predecessors, and to draw to himself as much as possible of their trade. When they change the appearance of their label, he, at a safe distance of time thereafter, makes a similar change in his label to correspond. When appellee's goods are ordered of him, he fills the orders with his own goods, and his agents take up from dealers appellee's goods and substitute appellant's therefor. (See Crane's dep., p. 80.)

On his dark label K, appellant states two absolute falsehoods, as his own testimony shows.

On said exhibit K, he states as a reason for changing the color of his label from red to dark "to prevent counterfeiting, I have changed the color of my label." Now, not only is there no evidence in the record to sustain this reason for making the change, but, on the contrary, on page 137 and page 188, in answer to question 355 of record, appellant testifies that he changed the color to get rid of worthless pills, and because the red label faded. Out of his own mouth, the falsehood of that statement on his label K is established. There is no doubt that statement on the label was made as a blind to prevent customers and appellee's predecessors from supposing that the change was made for the purpose of following the Pittsburgh house in their label.

Again, on his label, appellant calls his pill a vegetable pill, yet, when compelled under the order of the court to state the

ingredients of his pills, he states (page 285 of record) that, in a batch of 26 pounds, 8 pounds (nearly one-third) are calomel.

I submit there is nothing in the conduct of appellant, or in his testimony in the case, to commend him to the favorable consideration of a court of equity; but, on the contrary, the whole record places him in the light of a deliberate trespasser on the rights of appellee, and that the cases cited by his attorney, on the point of laches, are not applicable to this case as it is disclosed by the evidence.

The deposition of appellant shows that for a long time he sold his pills only in a small retail way, and when appellee's predecessors changed their label in 1855 to the dark one, (exhibit F,) they supposed they had shaken him off and had got rid of him. But it seems in this they were mistaken. In 1866, appellant began to infringe again. At that time, appellee was not engaged in the business, and had no connection with it till November 9, 1870.

We insist appellee's diligence is to be measured from the date he acquired the title, on November 9, 1870, and that the only laches he can be charged with is his own, and not that of his predecessors.

The court below only ordered an account from November 9, 1870, the commencement of appellee's right, and the propriety of that order is the matter that this court is to review. The decree limits appellee's remedy to the time of his ownership, to wit, November 9, 1870, and his duties ought to be measured by the same period of time. His obligations ought not to be greater or broader than his rights.

As appellee's right began in November, 1870, he clearly could not recover for injury committed by appellant before that time, nor would it be equitable to make him responsible for the shortcomings, if any there were, of his predecessor.

All the violations of appellee's rights for which he has recovered were committed by appellant after November 9, 1870, and appellee could only be guilty of laches as to those acts, for as to prior violations he had no right or power to sue or take action.

The case of Hovenden *v.* Lloyd, cited by the attorney on the other side, entirely fails to sustain the proposition that C. Fleming will be responsible for the acts of his predecessors.

Therefore I assume that no laches is shown, unless appellee is guilty of it between November 9, 1870, and June 1, 1872, a period of about eighteen months. Within a year from ownership, appellee began to gather proofs of violations. This was proper, as Lee *v.* Haley, 39 L. J. R., 286, shows.

As soon as these were obtained, the suit was brought. The clear preponderance of the authorities show there was no such laches as will take away the right to an account, especially as against a party standing in the position of appellant.

The defense of laches, or plaintiff's indulgence in the mouth of a fraudulent imitator, is an unconscientious and inequitable one. The defense is a confession of appellant's guilt, and is an attempt to escape the consequences by the baby plea of appellee's indulgence.

But, as Justice Woodbury says in 2 Woodbys & M., p. 8, there is something abhorrent in allowing such a defense to such a wrong.

It is claimed by appellant's counsel that appellee's lack of diligence relates back to 1854, and he refers to those parts of the bill found on pages 6 and 7 of the record.

The court will see, however, by reading the bill that the *gravamen* of the charges are the use of the dark label K, that being the only label used by appellant after appellee acquired title on November 9, 1870, and that the bill on pages 6 and 7, folio 16 and following, refers to the use of a red label by appellant, prior to 1855, for the purpose of showing the *fraudulent intent* of appellant. In fact, the bill charges that the use of the dark label K was but the carrying out of a fraudulent purpose, conceived by appellant prior to 1855, at which time he adopted his red label L, while appellee's predecessors were issuing their red label B; and the bill shows, on page 7, folio 18, that appellee's predecessors, to avoid the then fraudulent intent of appellant, changed their red label B, in 1855, to the dark label F, and thus frustrated said intent of appellant at that time.

The testimony of J. S. Merrill, pages 58 and 59 of the record, shows that appellant first made his pills in November, 1854, and got up his red label L about that date, and with the avowed purpose of palming off his article as that of the appellee's predecessors by means of a label closely resembling theirs. In 1855, appellee's predecessors, within a year from appellant's adoption of his red label L, changed their red label B to the dark one F. This was done to counteract the effect of appellant's imitation.

In testimony of Cochran Fleming, page 36 of record, folio 92:

Inter. 13. State what were the reasons for the change made by Fleming Bros., in 1855, from the red to the black label.

Ans. To counteract, if possible, the operations of J. H. McLean, who was then imitating our red label.

There was no lack of diligence here. From 1855 to 1866, appellant was using his red label L, while Fleming Bros. were using their dark label F.

On July 1, 1865, Cochran Fleming, the present appellee, went out of the business, and had no further connection with it till November, 1870, and, during that period, could not be guilty of any laches in the premises. At the time C. Fleming left the business, in 1865, appellant was still using the red label L. We insist that from 1866 to 1870 the inactivity of John Fleming can in no way prejudice the rights of appellee acquired in the latter year.

In the first place, the alleged acquiescence of even John Fleming, from 1866 to 1870, (there can be no acquiescence of appellee, as he was not during that period an owner,) was wholly gratuitous, and could at any time be withdrawn.

Amoskeag Manufacturing Co. *v.* Spear, 2 Sandf., S. C., p.

McCardel *v.* Peck, 28 How., Pr. R., 120.

As to the alleged purchase by John Fleming's New Orleans

house of appellant's goods, I refer to pages 14, 15, and 16 of original brief.

On this point I would add, further, that by a statute of Missouri appellant's testimony on this point was inadmissible.

However the court may hold the law to be, as to whether or not it was necessary to plead mere inactivity or laches as a defense, in order to make it available, it must hold, under the rules of pleading, that an *express license*, such as is attempted to be set up here by this evidence of John Fleming's acts and words, must be plead or set up in the answer to make it available to a defendant. (See pages 13 and 14 of original brief.)

Besides, to admit appellant's statements about John Fleming, was allowing him to fabricate evidence against a dead man, the falsity of which, in the nature of things, could not be met by counter proof, as John Fleming would be the only person who could testify about it.

I feel warranted in saying, in view of appellant's recklessness of statements in other respects, and of John Fleming's estimate of appellant's character, as shown by deposition of C. Fleming on page 50 of record, near top of page, folio 126, that appellant's statements on this point are not worthy of belief, and were so considered by the court below, to whom appellant is personally known.

Appellant's counsel, in his supplemental brief, pages 28 and 29, refers to the depositions of Henry, page 97 of record, and Treanor, page 98, as showing that appellee had notice in 1871 of infringements by appellant. I reply that those depositions do not show when appellee was informed of those sales. They fix the time of the sales, but do not show when appellee was informed of them. For aught that appears, his first information was when the depositions were taken after suit brought.

No averments were needed in the bill by way of excuse for not bringing suit earlier, for the bill shows that appellee only acquired title in November, 1870, and it further shows that the predecessors of appellee promptly changed their label from red to dark in 1855, when appellant began his imitation in 1854.

Until appellant, in 1866, began to imitate Fleming Bro's. dark label there was no need of action, and until Cochran Fleming acquired title in November, 1870, he could take no action.

There is not a particle of evidence that appellee knew of appellant's infringement of the dark label F by his label K at the time he came to the business, in November, 1870. The first knowledge he is shown to have had is when, in September or October, 1871, he began, through Porter, to cause orders for the McLane pill to be sent to appellant.

Appellant's counsel, in his supplemental brief, page 29, refers to the deposition of Porter, page 48 of the record, to show that he at least must have known of the infringement earlier. But I deny that his deposition shows it even by inference. In answer to interrogatory 14, page 47, folio 120, he says, "after a good demand had been established they discontinued that mode," *i. e.*, commissioning them to small dealers, "and sold to large dealers in the principal cities, who furnished the smaller dealers with their supplies."

On page 48 of the record, in answer to interrogatory 21, he says he had frequent conversations with dealers, who, without exception, stated that they believed appellant's labels, &c., were gotten up in imitation of appellee's. The time of such conversations do not appear, and, therefore, they do not prove what appellant's counsel claims, that Porter knew of these facts prior to 1871. The inference of earlier knowledge on the part of Porter, drawn by appellant's counsel, is not warranted by the evidence to which he refers.

The finding of the court below on this, as on other points, was in favor of appellee, and all presumptions are in favor of the decree, and, unless appellant can show affirmatively that error has been clearly committed, the decree must stand. It must be borne in mind that, when appellee took his testimony, the appellant, defendant below, had raised no question, in his answer or otherwise, as to laches or acquiescence, and thereby had really misled appellee, certainly as to this point.

He first raised the question of laches on his motion for a rehearing, after all the testimony was in.

For this reason we say the ground of defense should not be received with favor. *Non constat*, but that if appellant had plead it, and thus given appellee notice of it, he could and would have explained it to the fullest satisfaction of the court.

I aver that this ground of defense, which is now urged by defendant as his strongest hope for a reversal, is wholly an after-thought, and raised for the first time after all the proof was in, and by his motion for a rehearing he abandoned every other ground of defense but this. I rely on this petition for a rehearing as an admission and confession on the record by appellant that he had no cause of complaint against the decree, except this one of laches, which he had not set up in his pleadings, and did not raise till on the hearing and on the motion for a review. The fact was, the reading of appellee's proof on the hearing made his right of recovery so clear and convincing that appellant practically abandoned all other grounds of complaint, and clutched, as a last resort, at the forbearance of appellee.

The court below, as I believe this court will do, thought it inequitable that appellant should, by his pleadings, throw appellee off his guard on this point, and then spring it as a surprise on appellee at the hearing. The rules of pleading and fair practice require that a defendant should set up his defense and apprise complainant thereof.

See cases cited on pages 13 and 14 of original brief.

Especially should this be the case in the United States courts in equity, where all the proof is required to be by deposition, and where no oral testimony can be introduced at the trial to meet a point then for the first time made.

I take it for granted that this court, in view of the pleadings, the authorities cited, and the circumstances, as shown by the record, can have no difficulty in sustaining the decree, so far as this point is concerned.

III.

Comments on authorities cited by appellant.

1. Harrison *v.* Taylor, 11 Jurist, N. S., 408, decided in 1865.

In this case, laches were set up as a defense. The court, V. C. Wood, granted an injunction, but denied an account.

The case is not applicable to the one now before this court.

1st. Because delay was not set up in the answer.

2d. There was no evidence of fraudulent conduct on the part of defendant, as he testified he did not know of plaintiff's trade-mark for some time after he used his imitation label.

But in our case, now before the court, there is ample testimony of an intentional purpose to reap the benefit of appellee's trade-mark.

2. Beard *v.* Turner, 13 Law Times Rep., p. 747, decided in 1866, by same V. C. Wood, who decided the preceding case.

Defendant alleged he had exhibited his imitation label in the International Exhibition alongside of plaintiff's, who had examined them, and that this was two years before bill brought.

The court found there was no infringement, and that defendant acted *bona fide* and was guilty of no fraud, and that plaintiff had actual notice, &c., and had delayed for two years, and had induced defendant to lay out considerable sums, &c., and, on the whole case, found against plaintiff.

In our case, defendant did not set up delay. The proof further shows he acted with fraudulent purpose, and actually sold his own goods when plaintiff's were ordered of him.

Further, appellant's proof shows no special expenditure on his imitation article. It is true, he advertised his pills in connection with his other medicines, but not otherwise.

In our case, no actual notice to appellee of appellant's fraudulent acts is shown till about October, 1871, about eight months before suit brought.

Besides, the above two cases are the opinions of but one man, V. C. Wood, and I claim they are exceptional cases, and are not sustained by the current or weight of the authorities.

3. Rodgers *v.* Rodgers, 31 Law Times Report, decided in 1874 before the Lords Justices. Here delay was plead as a defense; defendants plead a user by them of their trade-mark for twenty-three years.

Yet the court, page 287, left column, say that the mere fact that defendants had used the name for a great number of years does not necessarily afford a defense. If clearly proven that defendant originally made the imitation for the purpose of fraud, and that it had the practical effect of deceiving the public, the lapse of years would not prevent plaintiff's remedy.

The court holds, page 287, near top of right column, that where defendant has imitated for many years there should be clear proof that defendant had acted fraudulently, and that his sales have affected a practical injury. I claim the above case as a good authority for appellee, and that he has brought himself within its principles by showing: 1st. That appellant has acted fraudulently; 2d. That we have shown appellant has sold his goods in place of appellee's, when he knew appellee's were ordered.

Estcourt *v.* Estcourt, 44 L. J. R., Ch. 223. This case does touch the point for which it is cited.

Amoskeag Manufacturing Co. *v.* Garner, 4 Am. L. T. N. S., 180, Supreme Court of N. Y.

Here laches was plead, and had continued for nine years, but there was no charge or evidence of any fraudulent acts on the part of defendant, as in this case. The absence of this element renders the case inapplicable as an authority.

Hovenden *v.* Lloyd, 18 Weekly R., 1132.

This case wholly fails to sustain the point for which it is cited.

By the answer, the title of plaintiff was denied; and, further, the answer alleged that defendant, who was the wife of plaintiff's assignor, had made the article complained of for fourteen years, and plaintiff's assignor had, during that time, sold it to plaintiff himself with the knowledge and consent of her hus-

band, assignor of plaintiff. The court held that plaintiff had no title to the trade-mark, under the circumstances as proven in the case.

I beg to refer to the following cases as clearly illustrating the principles applicable to trade-marks, and in point in this case:

Coats *v.* Holbrook, 2 Sandf. S. Ch. R., 645.
Taylor *v.* Carpenter, 2 Sandf. S. Ch. R., 664.

The case of Sullivan *v.* Portland, &c., R. R., 94 United States, 811, quoted in appellant's supplemental brief, decided since this case was tried, seems to assert that no formal averment of laches as a defense is necessary to enable the court to treat it as such, if the circumstances of the case require it. Still, I think the general rule remains, and is as stated in authorities cited in original brief. Fairness and good faith require that a plaintiff should have notice of what a defendant relies on for a defense. That decision, I claim, simply means that the court is not estopped from denying relief on the ground of laches, when the circumstances require it, even though not plead. In that case, there was a delay of seventeen years. In our case, there was no change of the circumstances of defendant or other facts that would make it inequitable to defendant to grant the relief prayed for, or that would justify this court in reversing the discretion of the court below on this point. The court below, with all the evidence before it, decreed for appellee. Was its equitable discretion unsoundly exercised? Certainly this court cannot say so without a careful reading and weighing of all the evidence. The case of Sullivan *v.* Portland, &c., R. R., concedes a discretion to the chancellor, and the exercise of that discretion violates no rule of law, nor will this court reverse for that reason.

M. L. GRAY AND
GEO. DENISON,
for Appellee.